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IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-1599

JEWELL D. CHANDLER, *Petitioner*,

v.

DONALD E. JOHNSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DONALD E. JOHNSON, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Jewell D. Chandler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this case on April 25, 1975.

OPINIONS BELOW

The opinion of the court of appeals is not officially reported. It is unofficially reported at 9 [CCH] EPD ¶ 10,123, and at 10 [BNA] FEP Cas. 689. The court of appeals' opinion is reproduced in the Appendix at pp. 34a-41a.

The opinion of the district court is not officially reported. It is unofficially reported at 7 EPD ¶ 9139, and

at 7 FEP Cas. 266. The district court's opinion is reproduced in the Appendix at pp. 30a-33a.

Also reproduced in the Appendix are the findings and recommended decision of the hearing examiner (App. 1a-17a), the decision of the Veterans Administration (App. 18a-21a), and the decision of the Civil Service Commission (App. 21a-29a).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a plaintiff who alleges unlawful discrimination in employment by a federal agency in a suit under the 1972 amendments to Title VII of the Civil Rights Act of 1964 is entitled to a plenary judicial trial *de novo,* as opposed to a review of the record of administrative proceedings before the defendant agency?

STATUTE INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16, provides in pertinent part as follows:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) the provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

STATEMENT

Petitioner, Jewell D. Chandler, is a black female employee of the Veterans Administration. In 1972 Ms. Chandler applied for a GS-13 Supervisory Claims Examiner position in the Division of the Los Angeles Region in which she was employed. As of October 1972, there were 16 positions above the GS-12 level in that Division, of which two were held by white females, and fourteen were held by non-black males. Of all Division employees, 38 percent were female and 25 percent were black. (App. 3a-4a).

Petitioner was designated as "highly qualified" for the position in question, and was referred, with other candidates, to the selecting official for his consideration. A non-black male was selected for the position. (App. 4a-5a).

Petitioner then filed a timely administrative complaint pursuant to 42 U.S.C. § 2000e-16(a) and 5 C.F.R.

§ 713.214, alleging that her non-selection for the position in question was due to unlawful discrimination on the basis of her race (black) and sex (female). Petitioner subsequently requested a hearing on her complaint.[1] An administrative hearing was accordingly held, at which Ms. Chandler, who is not an attorney, represented herself. The hearing examiner submitted findings and recommendations pursuant to 5 C.F.R. § 713.218(g), to the effect that petitioner *had* been discriminated against on the basis of her sex with respect to the non-selection in question, but that she had not been discriminated against on the basis of her race; and the examiner recommended that petitioner be promoted immediately and retroactively to the position in question. (App. 1a-17a).

Upon receipt of the hearing examiner's findings and recommended decision, a final decision was issued by the Veterans Administration. This decision rejected the examiner's finding of sex discrimination, accepted the finding of no race discrimination, and accordingly granted no relief. (App. 18a-21a). Petitioner then filed a timely appeal to the Civil Service Commission.[2] The Commission affirmed the Veterans Administration's decision. (App. 21a-29a). Petitioner then filed this suit pursuant to Section 717(c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c).

In the district court, petitioner first moved for summary judgment on the ground that the official who

[1] Such a hearing is not required, but is available at the complainant's option. 5 C.F.R. § 713.217(b).

[2] Such an appeal is not required, but is available at the complainant's option. 5 C.F.R. §§ 713.221(d), 713.231(a).

entered the Veterans Administration decision rejecting the hearing examiner's decision in petitioner's favor was, as a technical matter of delegation of authority, without authority to act in the matter. This motion was denied. Petitioner then promptly initiated discovery, filing notice of two depositions and a request for production of documents. The defendants moved for a protective order prohibiting the discovery, on the ground that discovery was impermissible because the judicial proceedings should be limited to a review of the administrative record. Petitioner opposed the motion for a protective order, asserting her right to discovery and to a plenary judicial trial *de novo*. In order to avoid deciding the issues presented in a piecemeal fashion, the district court held the question of discovery in abeyance pending (1) the filing of cross-motions for summary judgment on the basis of the administrative record, and (2) a determination by the court of the proper scope of the judicial proceedings.[3] After these motions were filed, the district court granted defendants' motion for summary judgment on the basis of the administrative record, without any pre-trial discovery and without any judicial evidentiary proceedings. The district court adopted the legal position of *Hackley* v. *Johnson,* 360 F.Supp. 1247 (D.D.C. 1973), *appeal pending,* D.C. Cir. No. 73-2072, concern-

[3] While the petitioner, pursuant to the procedure suggested by the district court, filed a cross-motion for summary judgment on the basis of the administrative record, her motion was without prejudice to her contention that she had a right to discovery and a trial *de novo*. This was clearly understood by the parties and the district court; it was at the court's request that the discovery and trial *de novo* issues were submitted simultaneously with motions for summary judgment on the administrative record. (Transcript of Proceedings, Nov. 26, 1973).

ing the nature and scope of judicial proceedings in Title VII cases against federal defendants. It then found "that the absence of discrimination is firmly established by the clear weight of the administrative record and hence plaintiff is not entitled to any relief." Apart from thus paraphrasing the *Hackley* standard for granting summary judgment in the government's favor on the basis of the administrative record, the district court's opinion did not explain or state any reasons for its finding against petitioner. (App. 30a-33a).

The court of appeals affirmed the district court's denial of petitioner's motion for summary judgment on the ground of improper delegation of reviewing authority, and affirmed the district court's denial of petitioner's cross-motion for summary judgment on the administrative record. (App. 36a-38a). This petition for certiorari does not seek review of these holdings.

The court of appeals also affirmed the district court's grant of summary judgment in the government's favor on the basis of the administrative record and its denial of a plenary judicial trial *de novo*. (App. 38a-41a). This is the issue with respect to which petitioner seeks a writ of certiorari. The court of appeals held that the district court correctly "adopted and applied the intermediate scope of inquiry expounded in *Hackley* v. *Johnson* [*supra*]," and that summary judgment in the government's favor was appropriate on the basis of the administrative record. (App. 39a-41a).[4]

[4] In ruling that a federal sector plaintiff is not entitled to a trial *de novo* as a matter of right, the court of appeals held that such a plaintiff must make a showing of necessity in his or her particular case before supplementation of the administrative record or a trial *de novo* is considered. The court then concluded that petitioner had not made such a showing of necessity. (App. 40a-41a). This conclusion by the court of appeals ignored the fact that petitioner had attempted to conduct discovery and had presented reasons why the discovery requested was necessary. In addition, while the court of appeals' opinion implies that petitioner was somehow remiss in her obligation to apprise the district court of the reasons why supplementation of the record or a trial *de novo* was necessary, in fact petitioner made her position and the reasons for it quite clear, and the procedure by which the issues were presented to the district court was the procedure which the district court itself requested. (*See* n. 3, *supra*; Transcript of Proceedings, Nov. 26, 1973).

REASONS FOR GRANTING THE WRIT

In 1972 Congress amended Title VII of the Civil Rights Act of 1964 to extend its coverage to federal government agencies. This case presents the most important issue that has arisen under the 1972 amendments in the more than three years since their enactment. That issue is whether Title VII actions against federal agencies are to be conducted in the same manner as Title VII actions against private companies, unions, employment agencies, and state and local governments: i.e., as plenary judicial proceedings. The decision below held that plenary judicial proceedings are not required, and that the district court may confine its inquiry to a review of the administrative record.

The writ of certiorari should be granted in this case to resolve conflicts among the courts of appeals and among the district courts concerning this recurring issue which has not been, but should be, settled by this Court. The Ninth Circuit's decision in the case at bar is in direct conflict with the decision of the Third Circuit in *Sperling* v. *United States,* —— F.2d ——, 9 [CCH] EPD ¶ 10,100, 10 [BNA] FEP Cas. 654 (3rd Cir. 1975) (App. 42a-81a).[5]

[5] Also in conflict with both the Third Circuit's decision in *Sper-*

The decision below sanctions a procedure for adjudicating federal sector Title VII cases that is wholly at odds with the procedure which this Court has mandated in the private sector. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). Such a double standard as to the scope of judicial proceedings under Title VII would defeat the entire purpose behind the 1972 amendments, which was to place federal employees and applicants on a par with employees and applicants in the private sector. *Morton* v. *Mancari,* 94 S.Ct. 2474, 2480-81 (1974). Since the forum of trial "inevitably affects the scope of the substantive right to be vindicated," the decision below undermines the principle that "the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government" by the 1972 amendments. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56; *Morton* v. *Mancari, supra,* 94 S.Ct. at 2481.

The decision below is inconsistent with the statutory language and legislative purpose of the 1972 amendments, and with the persuasive case law, including the decision of the Third Circuit in the *Sperling* case. Review by this Court is essential to resolve this important issue, and to restore to the 1972 amendments their intended vitality.

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ling and the Ninth Circuit's decision in the case at bar is the Tenth Circuit's decision in *Salone* v. *United States,* 511 F.2d 902 (10th Cir. 1975) (App. 82a-86a). The differences among these three court of appeals decisions are discussed *infra.* Petitioner is advised that certiorari is also to be sought in the *Salone* case. Because of the differences between the rule adopted in *Salone* and that adopted in the case at bar, it would be desirable for the Court to grant certiorari in *Salone* as well as in the case at bar, and to consider the cases together.

I

The Decision Below Is in Conflict with the Third Circuit's Decision in Sperling v. United States, and Numerous Other Decisions Are in Conflict on the Important Issue Which Is Presented

The decision below rejected petitioner's position that plenary judicial proceedings are required in federal sector Title VII cases. The court of appeals held that a plaintiff who desires that the judicial proceedings extend beyond a review of the administrative record must make a specific showing—in the present case without any prior discovery—that more than a review of the record is necessary in the circumstances of his or her particular case. This holding is in direct conflict with the Third Circuit's decision that "the Act mandates a trial *de novo* in all cases." *Sperling* v. *United States,* —— F.2d ——, 9 EPD ¶ 10,100, 10 FEP Cas. 654 (3rd Cir. 1975) (App. 74a). The Third Circuit's decision is based on an extensive analysis of the language and legislative history of the 1972 amendments, which led that court to the following conclusion:

> ". . . it was Congress' intent to provide an aggrieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant. . . . We hold therefore that the statutory language of the Act, as well as its legislative history, indicates a right to a trial *de novo* in the district court when suit is brought by an aggrieved federal employee pursuant to § 717(c)." *Sperling* v. *United States, supra,* App. 73a-74a.

In conflict with the Third Circuit's decision are the Ninth Circuit's decision in the case at bar (App. 34a-41a), as well as the Tenth Circuit's decision in *Salone* v. *United States,* 511 F.2d 902 (10th Cir. 1975) (App. 82a-86a).

Three years of litigation over this recurring issue have also spawned a large number of conflicting decisions in the district courts. A minority of the published district court decisions are in accord with the Third Circuit's conclusions in the *Sperling* case and the position advocated by the petitioner in the case at bar.[6] A majority of the published district court decisions are in accord with either the Ninth Circuit's decision in the case at bar or the Tenth Circuit's decision in the *Salone* case.[7]

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[6] *Second Circuit: Henderson* v. *Defense Contract Administration Services Region, New York,* 370 F.Supp. 180 (S.D. N.Y. 1973).

Fourth Circuit: Boston v. *Naval Station, Norfolk, Virginia,* 10 FEP Cas. 649, 654 (E.D. Va. 1974).

Fifth Circuit: Jackson v. *U.S. Civil Service Comm'n,* 379 F.Supp. 589 (S.D. Tex. 1973); *Griffin* v. *U.S. Postal Service,* 385 F.Supp. 274 (M.D. Fla. 1973); *Reynolds* v. *Wise,* 375 F.Supp. 145 (N.D. Tex. 1973-4); *Foster* v. *U.S. Civil Service Comm'n,* 9 EPD ¶9887, 10 FEP Cas. 756 (S.D. Tex. 1974); *Hill* v. *Seamens,* 9 EPD ¶10,095, 10 FEP Cas. 756 (S.D. Tex. 1975); *Sylvester* v. *U.S. Postal Service,* 10 FEP Cas. 758 (S.D. Tex. 1975).

Sixth Circuit: Hunt v. *Schlesinger,* 9 EPD ¶10,024, 10 FEP Cas. 52 (W.D. Tenn. 1974).

Eighth Circuit: Robinson v. *Klassen,* 9 EPD ¶9954, 9 FEP Cas. 84 (E.D. Ark. 1974); *Levens* v. *General Services Administration,* 9 EPD ¶10,153, 10 FEP Cas. 493 (W.D. Mo. 1975).

Ninth Circuit: Thompson v. *U.S. Department of Justice,* 360 F. Supp. 255 (N.D. Cal. 1973), *but see, Thompson* v. *U.S. Department of Justice,* 372 F. Supp. 762 (N.D. Cal. 1974), *appeal pending,* 9th Cir. No. 74-1847.

Tenth Circuit: Carreathers v. *Alexander,* 7 EPD ¶9379 (D. Colo. 1974); *but see, Carreathers* v. *Alexander,* 9 EPD ¶9858 (D. Colo. 1974).

District of Columbia Circuit: Spencer v. *Richardson,* 6 EPD ¶8906, 7 FEP Cas. 105 (D.D.C. 1973), *vacated sub nom Spencer* v. *Schlesinger,* 374 F.Supp. 840 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1787.

[7] *Third Circuit: Cates* v. *Johnson,* 377 F.Supp. 1145 (W.D. Pa. 1974), *appeal pending,* 3rd Cir. No. 74-2079; *Richerson* v. *Fargo,*

The decisions reaching a result contrary to that urged by petitioner and adopted by the Third Circuit

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64 F.R.D. 393 8 EPD ¶9751, 10 FEP Cas. 644 (E.D. Pa. 1974), 10 FEP Cas. 862 (E.D. Pa. 1975); *Guilday* v. *U.S. Department of Justice,* 385 F.Supp. 1096 (D. Del. 1974); *Allen* v. *Veterans Administration,* 8 EPD ¶9783, 10 FEP Cas. 195 (W.D. Pa. 1974); *Ficklin* v. *Sabatini,* 8 EPD ¶9829, 9 FEP Cas. 70 (E.D. Pa. 1974); *Smith* v. *Snyder,* 381 F.Supp. 1083 (E.D. Pa. 1974); *Ettinger* v. *Johnson,* 10 FEP Cas. 642 (E.D. Pa. 1974), *appeal pending,* 3rd Cir. No. 74-2171; *Russell* v. *Johnson,* 10 FEP Cas. 924 (W.D. Pa. 1975).

Fourth Circuit: Handy v. *Gayler,* 364 F.Supp. 676 (D. Md. 1973).

Fifth Circuit: Johnson v. *U.S. Postal Service,* 364 F.Supp. 37 (N.D. Fla. 1973), *aff'd per curiam,* 497 F.2d 128 (5th Cir. 1974) (trial *de novo* issue not discussed in *per curiam* opinion; opening sentence of opinion suggests question not raised on appeal); *Nimitz* v. *Berzak,* 7 EPD ¶9273 (E.D. La. 1974); *McLaughlin* v. *Callaway,* 382 F.Supp. 885 (S.D. Ala. 1974); *Eastland* v. *Tennessee Valley Authority,* 9 EPD ¶9927 (N.D. Ala. 1975), *appeal pending,* 5th Cir. No. 75-1855.

Sixth Circuit: Abrams v. *Johnson,* 7 EPD ¶9380, 9 FEP Cas. 107 (N.D. Ohio 1974); *Hockett* v. *Administrator of Veterans Affairs,* 385 F.Supp. 1106 (N.D. Ohio 1974); *Tomlin* v. *Air Force Medical Center,* 369 F.Supp. 353 (S.D. Ohio 1974); *Fisher* v. *Brennan,* 10 FEP Cas. 685 (E.D. Tenn. 1974).

Seventh Circuit: Caro v. *Schultz,* 9 EPD ¶9987 (N.D. Ill. 1974), *appeal pending,* 7th Cir. No. 74-1728.

Eighth Circuit: Haire v. *Callaway,* 9 FEP Cas. 168 (E.D. Mo. 1974).

Ninth Circuit: Evans v. *Johnson,* 7 EPD ¶9351, 8 FEP Cas. 1013 (C.D. Cal. 1974); *Thompson* v. *U.S. Department of Justice,* 372 F.Supp. 762 (N.D. Cal. 1974), *appeal pending,* 9th Cir. No. 74-1847; *Bernardi* v. *Butz,* 7 EPD ¶9381, 8 FEP Cas. 479 (N.D. Cal. 1974); *Wormley* v. *Dept. of the Navy,* 9 EPD ¶10,015, 8 FEP Cas. 1008 (N.D. Cal. 1974).

Tenth Circuit: Carreathers v. *Alexander,* 9 EPD ¶9858 (D. Colo. 1974); *Baca* v. *Butz,* 376 F.Supp. 1005 (D. N.M. 1974); *Brooks* v. *Lynn,* 10 FEP Cas. 638 (W.D. Okla. 1974).

District of Columbia Circuit: Hackley v. *Johnson,* 360 F.Supp. 1247 (D.D.C. 1973), *appeal pending,* D.C. Cir. No. 73-2072; *Robinson* v. *Warner,* 8 EPD ¶9452, 10 FEP Cas. 609 (D.D.C. 1974);

in *Sperling* may be analyzed in terms of two categories. These two categories are distinct in terms of legal theory, but they are, in many cases, equivalent in terms of practical effect.

The first category of decisions—exemplified by the Tenth Circuit decision in *Salone*—holds that the standard of judicial review in federal sector Title VII cases is the same as that enunciated in pre-Title VII adverse action cases: the decision of the agency or the Civil Service Commission is to be upheld if it is supported by "substantial evidence" in the administrative record.

The second category of decisions—exemplified by the Ninth Circuit decision in the case at bar—adopts the standard of review enunciated in the seminal case of *Hackley* v. *Johnson,* 360 F.Supp. 1247 (D.D.C. 1973), *appeal pending,* D.C. Cir. No. 73-2072. This standard

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Gautier v. *Weinberger,* 6 EPD ¶9001, 7 FEP Cas. 473 (D.D.C. 1973); *Pointer* v. *Sampson,* 62 F.R.D. 689, 7 EPD ¶9326, 7 FEP Cas. 905 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 73-1397; *Spencer* v. *Schlesinger,* 374 F.Supp. 840 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1787; *Coopersmith* v. *Johnson,* 7 EPD ¶9388, 10 FEP Cas. 627 (D.D.C. 1974); *Roney* v. *Saxbe,* 380 F. Supp. 1191 (D.D.C. 1974); *Pendleton* v. *Schlesinger,* 8 EPD ¶9598, 8 FEP Cas. 853 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1929; *Thomas* v. *Dept. of State,* 8 EPD ¶9622 (D.D.C. 1974); *Roberts* v. *Mumford,* 8 EPD ¶9692, 8 FEP Cas. 1195 (D.D.C. 1974); *Leinster* v. *Engman,* 8 EPD ¶9774, 10 FEP Cas. 614 (D.D.C. 1974); *McGowan* v. *U.S. Information Agency,* 8 EPD ¶9787, 10 FEP Cas. 618 (D.D.C. 1974); *Butler* v. *Kleppe,* 9 EPD ¶10,054, 10 FEP Cas. 869 (D.D.C. 1975); *Smith* v. *Gunther,* 9 EPD ¶9915 (D.D.C. 1975) (parties "conceded" that administrative record constituted the material facts of the case); *Marshall* v. *U.S. Highway Administrator,* 7 EPD ¶9814, 10 FEP Cas. 559 (D.D.C. 1973) (not clear whether this *pro se* case was brought under Title VII).

does not in theory exclude the possibility that a plenary judicial trial might be appropriate in some circumstances in federal sector Title VII cases. *Hackley* held that

> "The trial *de novo* is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." 360 F.Supp. at 1252.

In analyzing the facts in the claims before it, the *Hackley* court applied the above standard and a "preponderance of the evidence" test in determining whether the administrative decisions should be upheld. The fact that the *Hackley* court applied the "preponderance of the evidence" test (which is usually associated with trial level factual determinations), rather than the "rational basis" or "substantial evidence" tests (which are usually associated with review of an administrative record), indicates that it viewed its function, even after a full administrative hearing, as encompassing a broader scope of review than is employed in pre-Title VII adverse federal personnel action cases. 360 F.Supp. at 1252, 1253, 1255.

However, while there is a difference between the stated holdings of those courts (including the Tenth Circuit in *Salone*) which have adopted a "substantial evidence" approach, and of those courts (including the Ninth Circuit in the case at bar) which have adopted

the *Hackley* approach, it should not be assumed that the dichotomy of theory has resulted in a dichotomy of practice. To the contrary, a review of the cases cited at footnote 7, *supra,* will show that many of the district court decisions which cite and purport to follow the *Hackley* decision in fact apply a "substantial evidence" test, or an even less demanding standard (such as a determination that the administrative decision was not "arbitrary or capricious").[8]

In the more than three years since the 1972 federal sector provisions became effective, there is a plethora of published federal sector Title VII decisions, included in footnote 7, *supra,* denying a trial *de novo* and entering summary judgment on the merits in the government's favor on the basis of the administrative record. In contrast, there are only four published de-

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[8] *E.g., Handy* v. *Gayler,* 364 F.Supp. 676, 679 (D. Md. 1973) (purporting to follow *Hackley,* but adopting standard of adverse personnel action cases); *Tomlin* v. *Air Force Medical Center,* 369 F.Supp. 353, 356 (S.D. Ohio 1974) (purporting to follow *Hackley,* but stating that court will review record "for evidence of arbitrary action", and "if no arbitrariness is found, the Court will and should defer to administrative expertise"); *Nimitz* v. *Berzak,* 7 EPD ¶9273, at p. 7254 (E.D. La. 1974) (citing *Hackley,* but holding that administrative findings "are neither arbitrary nor capricious" and are "supported by complete and substantial evidence"); *Roberts* v. *Mumford,* 8 EPD ¶9692, at p. 5896, 8 FEP Cas. 1195, 1197-8 (D.D.C. 1974) (purporting to follow *Hackley,* but adopting "substantial evidence" test); *Cates* v. *Johnson,* 377 F.Supp. 1145, 1145-6 (W.D. Pa. 1974) (citing *Hackley,* but adopting "substantial evidence" test), *appeal pending,* 3rd Cir. No. 74-2079; *McGowan* v. *U.S. Information Agency,* 8 EPD ¶9787, at pp. 6304-5, 10 FEP Cas. 618, 619-20 (D.D.C. 1974) (citing *Hackley,* but adopting "substantial evidence" test); *Fisher* v. *Brennan,* 10 FEP Cas. 685, 687-8 (E.D. Tenn. 1974) (citing *Hackley,* but applying "substantial evidence" and "arbitrary or capricious" tests).

cisions entering judgment on the merits in a plaintiff's favor, and in two of these cases the court permitted a trial *de novo.*[9] Unless it is to be believed that discrimination in federal employment is such a rare occurrence that the 1972 Title VII amendments were not really even necessary, this state of affairs suggests the degree to which the effectiveness of the 1972 amendments has been undermined by decisions that have insulated the federal government's employment practices from plenary judicial scrutiny. More than three years of experience under the standard of *Hackley* and its progeny have confirmed the warning issued by the district court in the case of *Jackson* v. *U.S. Civil Service Comm'n,* 379 F.Supp. 589 (S.D. Tex. 1973):

> ". . . it is simply too easy for a federal judge operating under *Hackley* to lapse, in his discretion, into a review of the record using the substantial evidence test or the test set forth in *Chiriaco* v. *United States* [procedural due process and absence of arbitrary or capricious agency action]. . . . Only if a trial de novo is mandatory will be federal employee be assured of the congressional intent and that is a full, impartial review of the case in an adversary context." 379 F.Supp. at 594 (emphasis added).

The significance of the issue presented in the case at bar is further illustrated by a related issue which

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[9] *Reynolds* v. *Wise,* 375 F.Supp. 145 (N.D. Tex. 1973-4); *McLaughlin* v. *Callaway,* 9 EPD ¶10,098 (S.D. Ala. 1975). In one of the other cases the district court received supplemental evidence. *Robinson* v. *Warner,* 8 EPD ¶9452, 10 FEP Cas. 609 (D.D.C. 1974). In the other, the district court concluded that no supplemental evidence was necessary, and entered a summary judgment in the plaintiff's favor. *Day* v. *Weinberger,* 8 EPD ¶¶9646, 9771 (D.D.C. 1974).

this case does not present, but whose outcome is heavily dependent on the resolution of the trial *de novo* issue. The question of the availability of class actions in federal sector Title VII cases has not been the subject of any court of appeals decision to date. However, the Third Circuit has held that "it was Congress' intent to provide an aggrieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant." *Sperling* v. *United States, supra,* App. 73a-74a. If that is correct, then class actions should be available in federal sector Title VII cases (provided, of course, that the requirements of Fed.R.Civ.P. 23 are met). On the other hand, most district court decisions on the class action issue have proceeded under the assumption that federal sector Title VII cases are not *de novo* proceedings, and this assumption has inevitably led these courts to refuse class action treatment.[10] Thus it has been held that "federal employees cannot maintain class actions under Title VII" because "a class action . . . would require exploration of factual issues obviously beyond the record of a single employee"[11]; and that "[w]here there is review on the record and no trial *de novo,* there is no class action."[12] Because the majority of district courts have held against trial *de novo,* it is not surprising that there are at this writing

[10] For example, class certification was denied in the following cases, which are cited in footnote 7, *supra: Pointer* v. *Sampson; Spencer* v. *Schlesinger; Pendleton* v. *Schlesinger; Richerson* v. *Fargo; Ficklin* v. *Sabatini; Eastland* v. *Tennessee Valley Authority.*

[11] *Pendleton* v. *Schlesinger,* 8 EPD ¶9598, at p. 5569, 8 FEP Cas. 853, 853 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1929.

[12] *Spencer* v. *Schlesinger,* 374 F. Supp. 840, 844 n. 6 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1787.

only four reported decisions in which requests for class certification have received a favorable response.[13] The class action has been the backbone of Title VII's effectiveness in the private sector.[14] While the question of its availability in the federal sector is not presented in the case at bar, the relationship of that question to the trial *de novo* issue invests the latter with a weighty additional measure of importance.

The case at bar presents for decision the question which has been the major roadblock to proper implementation of the 1972 amendments for over three years. Until this question is finally resolved by this Court, the effectiveness of the 1972 amendments will continue to be drastically impaired.

II

The Decision Below Is in Conflict with Principles Established by Decisions of this Court

If the defendant in the case at bar were a private company rather than a federal agency, and the court of appeals had held that plenary judicial proceedings were not a matter of right and that the district court could, in its discretion, simply review the record of administrative or arbitral proceedings, then the decision below would be squarely in conflict with deci-

[13] *Allen* v. *Crosby,* 8 FEP Cas. 528 (E.D. Pa. 1973); *Richerson* v. *Fargo,* 61 F.R.D. 641, 7 EPD ¶9310, 7 FEP Cas. 488 (E.D. Pa. 1974), *vacated,* 64 F.R.D. 393, 8 EPD ¶9751, 10 FEP Cas. 644 (E.D. Pa. 1974); *Thompson* v. *McCormick,* 10 FEP Cas. 560 (D.D.C. 1974); *Sylvester* v. *U.S. Postal Service,* 10 FEP Cas. 758 (S.D. Tex. 1975).

[14] *See, e.g., Moody* v. *Albemarle Paper Co.,* 474 F.2d 134 (4th Cir. 1973), *cert. granted,* 95 S.Ct. 654 (1974).

sions of this Court. It is settled that Title VII actions against private sector defendants are *de novo* judicial proceedings, and that prior administrative or arbitral determinations cannot override the plaintiff's right to a plenary judicial trial. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974).

This petition therefore raises the fundamental question of whether the federal government is to be subjected to different and less demanding legal standards and procedures under Title VII than those to which all other classes of defendants are subjected. It seems obvious that a legislative intention to enshrine such a double standard could be inferred only from the most compelling evidence. *Compare, Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 89-91 (1973).

This Court has recognized that in Title VII actions, the forum of trial "inevitably affects the scope of the substantive right to be vindicated." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56. For this reason, the following recent statements by this Court are highly instructive on the present issue, even though they are addressed to the question of substantive legal standards rather than to any question of procedure:

> ". . . the mechanism for enforcing long-outstanding Executive Orders forbidding government discrimination had proved ineffective for the most part. [Footnote omitted.] In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and proscribed discrimination in most areas of federal government. . . . In general, it may be said that *the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government.* As stated in the House Report,

> " 'To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform policies. *The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly.'* H.R. Rep. No. 92-238, on H.R. 1746, 92 Cong., 1st Sess. 24-25 (1971)." *Morton* v. *Mancari,* 94 S.Ct. 2474, 2480-81 (1974) (emphasis added).

In addition, the following language of this Court's opinion in *Alexander* v. *Gardner-Denver Co., supra,* is in substantial part applicable by analogy to federal sector Title VII actions such as the case at bar:

> "[Title VII] does, however, vest federal courts with plenary power to enforce the statutory requirements. . . .
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> * * *
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> ". . . legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Title VII provides for consideration of employment-discrimination claims in several forums. . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. . . .
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> * * *
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> "The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions [here substitute 'federal agency or Civil Service Commission decisions'] would be inconsistent with that goal. Furthermore, we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'
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> * * *

> ". . . the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
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> * * *
>
> "The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." 415 U.S. at 47-60 (footnotes omitted).

The decision below is inconsistent with the established general principles set forth above. The substantive law developed in private sector Title VII cases is now fully applicable in the federal sector. The procedures followed in adjudicating federal sector cases must, therefore, be attuned to the full effectuation of the substantive rights which are involved. There is no justification for applying a double standard under Title VII and favoring federal agency defendants over all other types of defendants. The anomaly of such a double standard is especially striking in the present context, where the government opposes plenary judicial trials in federal sector Title VII cases, while the Solicitor General has successfully argued to this Court that a private sector plaintiff must receive a plenary judicial trial *de novo* regardless of prior adverse administrative and arbitral determinations.[15]

In *Sperling* v. *United States, supra,* the Third Circuit fully rejected the double standard which the Ninth

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[15] Brief for the United States as Amicus Curiae, *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, October Term, 1973.

Circuit adopted in the case at bar. Certiorari should be granted so that this Court can determine whether or not its decisions in private sector cases are to apply with full force and effect to the federal government.

III

The Decision Below Is Inconsistent with the Language and Purpose of the 1972 Amendments to Title VII

A. The portion of Title VII as amended which creates a right to sue federal government defendants —Section 717(c), 42 U.S.C. § 2000e-16(c)—provides that at certain specified stages in the administrative enforcement procedure (to be discussed below), a complainant, "if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file *a civil action as provided in section 706. . . .*" (Emphasis added.) Section 706 is the portion of Title VII which details the procedures to be followed in civil actions against private sector (and state and local government) defendants. In addition, Section 717(d) of Title VII, 42 U.S.C. § 2000e-16(d), which defines the judicial procedures that "shall govern" civil actions brought against federal agencies under Section 717, reads as follows:

> "The provisions of section 706(f) through (k), as applicable, shall govern actions brought hereunder."

A review of Sections 706(f) through (k) provides compelling support for the view that actions against the federal government under Title VII are to proceed in the same manner as actions against private employers,

and are to include a plenary judicial trial of the plaintiff's allegations. The Third Circuit, having reviewed this statutory language, concluded that it "hardly admits of any other interpretation." *Sperling* v. *United States, supra,* App. 60a.[16]

The Third Circuit's analysis is further buttressed by a full review of the various stages in the administrative enforcement procedure at which the statute gives the complainant the option to file his civil action. Section 717(c) of Title VII, 42 U.S.C. § 2000e-16(c), and the Civil Service Commission's implementing regulations, 5 C.F.R. §§ 713.201, *et seq.*, provide that an employee or applicant for employment who has filed an administrative complaint with his agency may file a civil action in federal district court in any of the following six basic circumstances:

1. if 180 days have elapsed since the filing of the administrative complaint and *the agency has not taken final action on the complaint* (whether or not a hearing has been held); 42 U.S.C. § 2000e-16(c); 5 C.F.R. § 713.281(b);
2. within 30 days of a *rejection or cancellation of the complaint*; 42 U.S.C. § 2000e-16(c); 5 C.F.R. § 713.215;

[16] It is true, of course, that Section 717(d) says that Sections 706(f) through (k) shall govern "as applicable." But as a review of the sections makes clear, that phrase merely covers the fact that portions of certain sections such as those dealing with the Equal Employment Opportunity Commission and the Attorney General—*e.g.*, Sections 706(f)(1), 706(i), 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(i)—are obviously not applicable to actions against the federal government. To read more than this into the phrase "as applicable" would render Section 717(d) meaningless. *Sperling* v. *United States, supra,* App. 62a-64a.

3. within 30 days of receipt of notice of *final agency action* on the complaint *without a hearing;* 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.217(b)(3), 217(c), 221(b)(1), 221(b)(3), 281(a);
4. within 30 days of receipt of notice of *final agency action* on the complaint *following a hearing;* 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.217(b)(2), 221(b)(2), 281(a);
5. if 180 days have elapsed since the filing of an appeal from the final agency action (with or without a hearing) to the Civil Service Commission and *the Commission has not taken final action on the appeal*; 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.231(a), 281(d); or
6. within 30 days of receipt of notice of *final Civil Service Commission action on an appeal* from the final agency action (with or without a hearing); 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.231(a), 281(c).

It should be noted that even the above categorization is in fact an oversimplification, since circumstances 1, 5 and 6 can be subdivided into two different categories depending on whether an administrative evidentiary hearing has been held; and it should be noted that in all cases the question of whether such a hearing is held is completely at the option of the complainant. 5 C.F.R. §§ 713.217(b), 713.221(b). It should also be noted that the scope and nature of the agency's investigation of a complainant's allegations where no administrative hearing is held is completely controlled by the agency; and that even where the complainant elects to proceed to an administrative hearing, he has no rights to discovery comparable to those provided by the Federal Rules of Civil Procedure. 5 C.F.R. §§ 713.216, 713.218.

It is immediately apparent from the six-category analysis set forth above that the only statutory prerequisite to maintaining a civil action common to all of the six circumstances listed is the filing of an administrative complaint; neither an agency or CSC decision, nor an administrative hearing, is a precondition to invocation of the judicial process. The language of Section 717 gives the federal employee or applicant for employment the right to invoke the judicial process in each of circumstances 1-6 and their subdivisions. It is highly significant that the statute and the CSC regulations make absolutely no distinction between the nature of the judicial proceedings afforded in the different circumstances. In each circumstance the civil action is simply "governed" by Sections 706(f) through (k). 42 U.S.C. § 2000e-16(d). Since no distinctions are made among the rights of plaintiffs who are in different circumstances, the judicial process contemplated must be the same in all cases. And since no explicit restriction on the judicial process is stated in the statute, the process is impliedly unrestricted.

In some of the circumstances enumerated anything less than a plenary judicial trial would be plainly unthinkable. For example, in circumstance 1 the plaintiff files his civil action after 180 days have elapsed with no final agency action on the initial administrative charge. It may be that the agency's investigation has not even been commenced; or there may have been an investigation but no CSC-appointed examiner's hearing; or there may have been a hearing but no examiner's findings; or there may have been a hearing with findings but no final agency decision. In the first two cases, due process would clearly require the district court to hold an evidentiary hearing. In the third case,

the absence of any findings by the officer who heard testimony would also dictate a new hearing before a judge who would make his own findings. In the fourth case there would at least be a record and findings for the judge to review. But regardless of the fact that each of these four cases could potentially arise within the confines of circumstance number 1, the statute draws no distinctions concerning the treatment to be accorded "civil actions" filed in the various cases described. Since a plenary trial is obviously required in the first three cases, it follows that it is required in the fourth and in other cases as well. Indeed, if Congress had intended that judicial proceedings under the 1972 amendments be limited to a "review of the record," it would certainly not have authorized suits in cases where there is no record to review.

As previously noted, the statute also contemplates situations other than those just described, *e.g.*, suit after final agency action, after final CSC action, and after the CSC has failed to render a decision within one hundred eighty (180) days. Each situation may or may not have involved an evidentiary hearing with findings. Yet despite the obvious differences among these situations, the statute makes no distinctions and the scope of the employee's "civil action" is not restricted under any of the various circumstances. Title VII is a remedial statute and the courts may not engraft upon it restrictions which it does not itself impose. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 798-9 (1973). It follows that the "civil action" to which a plaintiff is entitled is, as the statutory language so clearly indicates, a plenary judicial proceeding, including presentation of the case to a district judge, who will hear and determine the case after

discovery and a trial on the merits, and grant whatever relief is appropriate in light of his findings.[17]

B. The legislative history of the 1972 amendments to Title VII affirmatively indicates that Congress did not intend to limit the judicial function in federal sector Title VII ligitation to review of an administrative record, but intended to grant federal sector plaintiffs the same rights as private sector litigants, including the right to a full evidentiary hearing in district court.

The Senate Committee Report on the new Section 717(c) authoritatively states the legislative purpose behind the creation of a right of action in the federal sector:

> "Aggrieved employees or applicants will also have *the full rights available in the courts as are granted to individuals in the private sector under title VII.*" S. Rep. No. 92-415, 92d Cong., 1st Sess. at 16-17 (1971); *Legislative History of the Equal Employment Opportunity Act of 1972,* 92d Cong., 2d Sess. (Committee Print, 1972) [hereinafter cited as *History*], at 425 (emphasis added).

As the House Committee on Education and Labor reported in June 1971, the Civil Service Commission was responsible for a "critical defect" in the federal

[17] This is not to say, of course, that in no case would a summary judgment be possible under ordinary Rule 56 standards. *Sperling* v. *United States, supra,* App. 74a, 79a. If, for example, uncontroverted evidence established that the plaintiff was never employed by and never applied for employment with the defendant agency, there would obviously be no genuine issue of material fact and the court could dispose of the plaintiff's fraudulent claim by summary judgment. But in the case at bar triable issues of fact concerning whether the petitioner was discriminated against clearly exist under ordinary Rule 56 standards as applied in cases where plenary judicial trials are normally afforded.

government's efforts to implement a policy of equal employment opportunity. The administrative process for investigating and resolving discrimination complaints—a process which was, then as now, devised and overseen by the CSC[18]—actually "impeded rather than advanced" the goal of eliminating discrimination, and led to "a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees."[19] *Morton* v. *Mancari,* 94 S.Ct. 2474, 2480-81, 2481 n.22 (1974). Under the CSC regulations—then as now—the supposedly independent hearing examiner's findings and decision on a discrimination complaint were merely recommendations to the offending agency, which in turn would render the final decision itself. Thus, the agency acted as both defendant and judge. The continued workings of this process are vividly illustrated by the case at bar, in which the hearing examiner found that petitioner had been discriminated against, and the defendant agency simply rejected the examiner's adverse findings. (App. 1a-17a, 18a-21a).

In *Sperling* v. *United States, supra,* the Third Circuit reviewed the legislative history of the 1972 amend-

[18] Detailed CSC regulations for processing complaints of discrimination which were quite similar to the regulations now in effect were already in existence three years prior to the 1972 amendments. The regulations were expanded somewhat after the amendments, to include, for example, provisions concerning the right to sue provided by the amendments, clarifying the authority to award certain types of relief, and allowing third party allegations (but recognizing no right to sue on the basis of such allegations). In most other respects, the regulations are basically unchanged. *Compare* 5 C.F.R. Part 713, 34 Fed.Reg. 5367 (Mar. 19, 1969), as amended at 34 Fed.Reg. 14023 (Sept. 4, 1969) *with* 5 C.F.R. Part 713, 37 Fed.Reg. 25699 (Dec. 2, 1972).

[19] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 24 (1971) (hereinafter House Report); *History* at 84.

ments in considerable detail, and concluded that "it was Congress' intent to provide an aggrieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant," including "a right to a trial *de novo*." (App. 73a-74a). The court of appeals' opinion in the case at bar is devoid of any analysis in support of its contrary conclusion. (App. 39a-40a).

The conclusion reached by the Third Circuit in *Sperling* is in no way inconsistent with the Congressional determination to maintain the Civil Service Commission's administrative role in federal sector cases. Congress clearly intended that the courts would provide federal sector litigants a full evidentiary hearing as a check on the Civil Service Commission, just as it intended that the courts would provide private sector litigants a full evidentiary hearing as a check on the Equal Employment Opportunity Commission. The opportunity for a full judicial hearing was provided in both federal and private sector cases in part because Congress expressly recognized that both CSC and EEOC were inherently partisans, though partisans of different standards. CSC was viewed as a partisan of the federal employer, since it is responsible for the approval of the very agency employment standards whose lawfulness many Title VII complainants call into question. EEOC was viewed as a partisan of the private employee, since it is the prosecutor of his case. Thus the Senate Committee report on Section 717(c) states:

> "The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which

> may result in a lack of true equal employment opportunity.
>
> * * *
>
> "An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision." S. Rep. No. 92-415, 92d Cong., 1st Sess. 15-16 (1971); *History* at 424-25.[20]

Nor is the conclusion that Congress granted federal sector litigants the right to a full evidentiary hearing in court inconsistent with the purpose of maintaining an internal grievance procedure within the federal government. Congress carefully provided in Section 717(c) that prior to filing suit under Title VII a federal sector complainant must first file a formal complaint with his agency, and await an agency decision, so that the agency will have an opportunity to put its own house in order. As soon as the agency reaches a decision, however, or permits 180 days to pass without taking final action, this policy has been fulfilled, and the complainant may proceed directly to court. If the complainant prefers first to proceed to further stages in the internal grievance procedure, he is free to do so; but no penalty attaches to such an election (so as not to deter further resort to administrative procedures), and subsequent timely resort to a court action still results in a plenary judicial trial. These conclusions are perfectly consistent with the dual policy of preserving the internal grievance procedure but also providing a judicial remedy.

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[20] For further remarks regarding Civil Service Commission bias, see Remarks of Rep. Fauntroy, *History* at 269-271; and Remarks of Rep. Frenzel, *History* at 299. The "built-in conflict of interest" characterization is also contained in the House Report at 24, *History* at 84.

C. In the case at bar the court of appeals adopted the approach of the district court in *Hackley* v. *Johnson,* 360 F. Supp. 1247 (D.D.C. 1973), *appeal pending,* D.C. Cir. No. 73-2072. The error of the *Hackley* decision is discussed at length by the Third Circuit in the *Sperling* case. (App. 64a-79a). Petitioner submits that *Hackley* represents in essence an impermissible attempt at judicial modification of the 1972 amendments. The *Hackley* court's decision was substantially motivated by its belief that to permit plenary judicial trials in federal sector Title VII cases would place an unacceptable "burden" on the district courts in the District of Columbia. 360 F. Supp. at 1249 n.2 and text at n.2. This kind of consideration is simply foreclosed by the legislative decision which Congress made in 1972 when it extended Title VII's judicial remedy to the federal sector. *Sperling* v. *United States, supra,* App. 78a-79a.

In commuting the right to plenary judicial proceedings to a matter of discretion, the *Hackley* court erroneously emphasized the limited scope of review of CSC proceedings which was available prior to the 1972 amendments, concluding that "[o]bviously a trial *de novo* would involve a very different approach." 360 F. Supp. at 1250. In fact, it was the express purpose of the 1972 amendments to afford such a "different" approach, replacing the narrow scope of review previously applicable through the Administrative Procedure Act. *Sperling* v. *United States, supra,* App. 60a, 64a; *see also, Reynolds* v. *Wise,* 375 F.Supp. 145, 148-9 (N.D. Tex. 1973-4).

In the case at bar the district court's decision in the government's favor contained no discussion of the facts of the case, no indication of why it had concluded

that petitioner had not been discriminated against, and no explanation of why it had decided in this particular case to limit the judicial proceedings to a review of the administrative record. (App. 30a-33a). The court of appeals did state its reasons for concluding that petitioner had not been discriminated against. (App. 38a-39a). But neither the district court, nor, of course, the court of appeals, heard any testimony; and the only officer to hear testimony—the complaints examiner—concluded that the evidence required a finding of discrimination. (App. 1a-17a). In a case revolving around the selecting official's reasons for failing to select petitioner—who, it is undisputed, was "highly qualified" for the position in question—it is obvious that important judgments concerning the credibility of witnesses' testimony are involved. The hearing officer, who observed the testimony, found in favor of petitioner; the district court, and the court of appeals, acted on a cold record when they affirmed the defendant agency's rejection of the complaints examiner's finding.

The court of appeals held that petitioner was not entitled to a trial *de novo* as a matter of right, but was required to demonstrate a need in her particular case for supplementation of the administrative record or for a trial *de novo.* (App. 40a-41a). This was an anomalous burden to place on a party who had sought but not been permitted to conduct any discovery, and who had prevailed before the only officer to hear, and judge the credibility of, oral testimony. But even assuming *arguendo* that such a showing by petitioner was required, the court of appeals simply ignored the record in holding that no showing of necessity had been made. One of petitioner's first acts after suit was filed in the

district court was to notice the deposition of, and request production of documents by, the selecting official; and to notice the deposition of the person selected in preference to petitioner for the job in question. Since petitioner represented herself at the administrative hearing, the selecting official had never been questioned by an attorney acting in her behalf. And the complaints examiner had refused to call 15 of the 24 witnesses whom petitioner had requested, including the individual selected for the job in question, whose deposition petitioner sought in the district court; the selectee was surely a material witness whom petitioner was entitled to examine when the issue was whether he was better qualified than she for the job in question. Petitioner made clear in the district court the reasons why she needed the discovery which she had requested.[21]

The decision below is based on a conclusion that Congress intended to provide federal and private employees with "equivalent, but not identical, judicial remedies under Title VII." (App. 40a). It is difficult to see how a judicial remedy which does not include discovery or the right to have a court evaluate the credibility of witnesses by observing their testimony could be deemed equivalent to the *de novo* judicial proceeding which this Court has mandated in private sector Title VII cases. The administrative procedure provided by the Civil Service Commission's regulations (5

[21] As set forth at nn. 3, 4, *supra*, the procedure pursuant to which the issues were presented to the district court was the procedure which the court itself requested. Petitioner certainly cannot be faulted, therefore, for any defects which the court of appeals perceived in that procedure. Petitioner supplied the district court with all the information which it requested or required on the trial *de novo* question, and, as the record reflects, the district court never suggested otherwise.

C.F.R. § 713.201, *et seq.*) is certainly not equivalent to a judicial proceeding. Typically, as in the case at bar, the complainant is not represented by an attorney at the administrative level; in any event, there is no provision for court appointment of an attorney for the complainant, or for an award of attorneys' fees if the complainant prevails.[22] The investigation which is conducted is produced under the direction of, and entirely controlled by, the agency which is the defendant in any subsequent judicial proceedings. Only if the complainant so elects is an administrative evidentiary hearing held, and even then there is no subpoena power available to the complainant, and no right to discovery comparable to that provided by the Federal Rules of Civil Procedure. The CSC's own handbook for complaints examiners explains that "[t]he hearing is an adjunct to the investigation. *It is not an adversary proceeding but is an administrative proceeding designed to provide additional evidence.*"[23] The court of appeals plainly erred in concluding that such an administrative proceeding followed by judicial review of the record could provide a remedy "equivalent" to a plenary judicial trial.

[22] *Compare*, 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(k).

[23] U.S. Civil Service Commission, *Discrimination Complaint Examiner's Handbook* (April 1973), at p. 5.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1975.

APPENDIX

COMPLAINTS EXAMINER'S FINDINGS AND RECOMMENDED DECISION

FINDINGS AND RECOMMENDED DECISION IN THE DISCRIMINATION COMPLAINT OF:

COMPLAINANT: Jewell D. Chandler, 5719 Aladdin St., Los Angeles, CA. 90008

REPRESENTATIVE: None

AGENCY: Veterans Administration, Regional Office, 11000 Wilshire Blvd., Los Angeles, CA. 90024

REPRESENTATIVE: James W. Bolita, Assistant Chief, Finance & Data Processing Division, VA Regional Office, 11000 Wilshire Blvd., Los Angeles, CA. 90024

COMPLAINT: Discrimination—Race (Black) and Sex (Female)

DATES OF HEARING: January 26 and 29, 1973

COMPLAINTS EXAMINER: Edna E. J. Francis, 851 So. Broadway, Los Angeles, CA. 90014

INTRODUCTION

The complaint by Mrs. Jewell D. Chandler (hereinafter referred to as Complainant) that the Veterans Administration (hereinafter referred to as the Agency) discriminated against her because of race (Black) and sex (female) arose when she was not selected for a GS-13 supervisory position.

After Complainant learned she was not selected for the position, she had an initial interview with the EEO Counselor, Mr. William Hall, Jr. In an attempt to resolve her complaint, Mr. Hall consulted with the Personnel Officer, the Adjudication Officer (the alleged discriminating official) and the Director of the VA Regional Office, Los Angeles. On September 25, 1972, Complainant filed a formal complaint of discrimination, explaining why she believed the selecting official had discriminated against her in the promotion action. The EEO Counselor held a final interview with the Complainant on October 3, 1972.

Mr. Robert C. Mark, Chief, Recreation Therapy, PMRS, VA Hospital, Sepulveda, CA., designated to investigate the complaint, made an investigation during the period from October 10, 1972 to October 25, 1972. Since no satisfactory adjustment could be made on the complaint, the Agency notified the Complainant on November 10, 1972, that she had a right to a hearing and a subsequent decision by the General Counsel. Complainant advised the Agency on November 17, 1972 that she wanted a hearing.

A hearing was conducted on January 26 and 29, 1973 by the undersigned examiner. Testimony was heard from a total of ten witnesses, seven called by the Complainant, two by the Examiner, and the Complainant in her own

behalf. The Agency did not call witnesses. Although the parties did not offer exhibits at the hearing, the undersigned sought additional information from the agency which would be helpful in resolving the complaint: supervisory appraisals of the Complainant and the person selected for the position; information regarding promotions made by the alleged discriminatory official during the past two years; and the official personnel files of the Complainant and the person selected for the position. To the extent necessary, information from those sources was considered in arriving at a decision on this complaint.

To avoid infringing any rights of privacy, the Examiner has summarized and interwoven into the body of the decision information gleaned from official personnel folders and supervisory appraisals, rather than place in the file verbatim copies of relevant material from these sources. The information sheet regarding promotions made by the selecting official within the past two years is marked as Hearing Exhibit #1. The verbatim transcript of the hearing has been made part of the record.

BACKGROUND

Complainant began her career with the Veterans Administration Regional Office, Los Angeles, on April 24, 1966, in the Adjudication Division as a Claims Clerk, GS-7. She was promoted to Veterans Claims Examiner, GS-9, in the Adjudication Division on October 8, 1967, advanced in that position to GS-11 on June 15, 1969, and was promoted to her present grade level, GS-12, on March 21, 1971.

The Adjudication Division has 276 employees whose grades range from GS-3 to GS-15. Of that number, 180 are Caucasian, 69 are Black, and 27 are of other minority designation, such as Mexican-American, Japanese-American, and Filipino-American. As of October 13, 1972 when the Investigator made his investigation, 30 of 159 employees in Grades 9 through 15 were Black; 46 of the 159

were female. In grades 3 through 7, 39 of 117 employees were Black; 60 of that number were female. The investigative report reflects that at the time of the investigation, Adjudication Division had no Blacks in positions above GS-12; two females (Caucasian) were employed above that level, both as GS-13 supervisors.

Complainant applied for the position of Supervising Veterans Claims Examiner (Section Chief), GS-13, pursuant to Promotional Announcement No. 80-72, which is undated (Complaint File Exhibit 26). Because the evaluation panel identified her as one "highly qualified" for the position, she was referred for further consideration to the interview panel, in accordance with the VA Promotion Plan (Complaint File Exhibit 27). When Complainant learned she was not selected, she invoked the discrimination complaint process, alleging that the Adjudication Officer, Mr. Martin C. Holland (Caucasian), did not select her for the position as his immediate subordinate because he did not want a black female on his supervisory staff.

Complainant filed CSC Form 894 (Complaint of Discrimination in the Federal Government) on September 25, 1972 and supplemented it with a memorandum to the Director, VA Regional Office, Los Angeles. (The form and the memorandum appear in the Complaint File under Exhibit 37).

The Complainant supported her complaint of discrimination with the following allegations, in substance:

(1) that she had demonstrated technical proficiency in the three main areas of responsibility for the Section Chief position (compensation, pension, and education claims) whereas the male selected for the position had not demonstrated technical proficiency in all three areas;

(2) that she did not receive due consideration for her "potential" to perform in a supervisory capacity, inasmuch as she had frequently performed many of the responsibilities associated with supervision

whereas the male selected for the position had rarely performed supervisory responsibilities and therefore had not demonstrated "potential";

(3) that she was not given due credit for her sick leave balance, as required by the VA Promotion Plan;

(4) that she had the ability to read computer printouts, an ability which is needed in the supervisory position, whereas the male selected for the position lacked that ability at the time of his selection;

(5) that the selecting official gave disproportionate weight to the significance of a law degree, because it enhanced his justification for selecting a male for the position;

(6) that the selecting official had never selected a female for a GS-13 position, and did not wish to select a female supervisor, especially not a black female, for the GS-13 Section Chief position.

Issue

Whether the Veterans Administration Regional Office, Los Angeles, discriminated against the Complainant when it did not select her for the position of Supervising Veterans Claims Examiner.

Analysis and Findings

Allegation 1. The Adjudication Officer, Mr. Holland, testified at the hearing that the employee selected for the position, Mr. Inocentes Dineros (Filipino-American), "has never worked in the education phase of our operations, but does have some overall familiarity with the situation." (Hearing Transcript, p. 18). He stated that a Section Chief does not have to be familiar with all of the details of an area as the individuals doing the work; rather, as a supervisor, one has to be familiar enough with certain areas to know what the employees are doing, what changes are going on, and where to get information when necessary.

Mr. Dominic Ballanti (Caucasian), a Section Chief in Adjudication Division, testified that he had been at the VA Regional Office longer than Mr. Dineros and that during his tenure there has never known Mr. Dineros to work on any type of educational awards (Hearing Transcript, p. 27).

It is undisputed in the record that the Complainant has worked in all areas of authorization—compensation, pension and education. Mr. Holland said of the Complainant at the hearing: "I would say Mrs. Chandler is knowledgeable, very knowledgeable in the area of education, above average in knowledge of compensation and pension" (Hearing Transcript, p. 20).

On the basis of the foregoing information, it is my finding that Allegation 1 has been substantiated.

Allegation 2. The forthcoming analysis will deal with formal and informal training administered by Complainant and Mr. Dineros to others, and their participation in extra-detail assignments and self-development activities.

According to testimony at the hearing by Mr. Holland, he has never known Mr. Dineros to train employees as part of a special assignment. (Hearing Transcript, p. 16). There is no documentation in Mr. Dineros' Official Personnel Folder (OPF) which would indicate that he has ever formally trained employees. The justifications for several performance awards commend him for his ability to motivate and assist employees. The earlier award, granted to him in June 1971 as a GS-12 Veterans Claims Examiner, contains some evidence that he, through personal instruction and consultation, did a commendable job in upgrading the work of several adjudicators who needed assistance in compensation and pension work, and that he did an excellent job reviewing and screening cases of senior adjudicators and adjudicators assigned to his digits. The later award, granted to him in August 1972, recognized him for his ability to successfully supervise his section in the absence of

his Section Chief; his guidance to employees; insuring application of current directives, decisions and information; and his public relations abilities. In a memorandum dated January 12, 1972, his supervisor, Mrs. Fillerup, commended Mr. Dineros for the quality and quantity of work he produced and for the patience and empathy he exhibited in training Section E employees. On November 19, 1971, the Chief Attorney commended Mr. Dineros for his exceptional work during a detail to Field Legal and Investigative Section which resulted in excellent production and materially contributed to reducing the field examination backlog.

After acknowledging that extra-detail assignments are part of the Section Chief's position, Mr. Holland told the Investigator that Mr. Dineros has never participated in extra-detail assignments. In answer to the Investigator's question, "Has Mr. Dineros participated in the extra-detail program, Mr. Holland replied: "No, he just became a Section Chief. Some are better speakers than others, but we expect all to participate." (Complaint File, Exhibit 2, p. 41).

Neither the complaint file nor Mr. Dineros' OPF contains evidence that he participated in any self-development activities related to supervision, prior to his selection for the position.

Complainant's OPF contains the following documentation of her administration of formal and informal training to Veterans Administration employees as well as to persons outside the Agency: (1) On March 14, 1972, Mr. Holland wrote a memo expressing "his appreciation to [her] for participating as a discussion leader in the March 9 group meeting which was held to tell interested Regional Office employees from other Divisions about the Adjudication Division." (2) The Director of Los Angeles City College sent her a letter on December 3, 1970, expressing his gratitude for her significant contribution to the Veterans'-Staff Training Program. The letter continued, "The eval-

uation forms which our participants completed on the last day of the 5-day training program reveal how grateful the delegates were for the information you were able to give them." (3) A quality step increase granted to Complainant in August 1970 recognized her for her effective working relationships. The justification for the award states in part, "Mrs. Chandler as a group leader has supervision of Claims Examiners and Clerks and is responsible for the timely processing of a work load digit assignment. Her supervisory techniques and highly effective relationship with the group personnel results in high productivity, timely processing, minimum errors and excellent morale. During daily operations I find Mrs. Chandler's group current as to work load processing and very seldom is it necessary to level cases from her group to others. On the contrary, I frequently find it necessary to distribute cases to Mrs. Chandler in an effort to maintain currency of operations within the Section. . . .

The award continues, "In early June plans were made to hire 30 law students to aid in the processing of the summer enrollments. Due to Mrs. Chandler's exceptional working knowledge of VA procedures and ability to instruct personnel, we selected her as principal instructor and supervisor of the training group responsible for orientation and training of the temporary employees . . . Mrs. Chandler has very effectively presented a comprehensive training program which has resulted in a group of well-trained individuals . . . As a result of Mrs. Chandler's determined effort, we have been able to process the summer peak enrollment work-load with minimum delay. This has resulted in timely payments to students, minimum inquiries regarding delinquent payments, good public relations, and other tangible benefits. Her performance as training supervisor has been exceptional." (4) On January 28, 1970, Authorization Section Chief-E (Mrs. Margarette Fillerup) commended Complainant in a memo which states in part: "During recent months, your group has kept current considering the 7-day timeliness factor. This is due primarily to your good screening techniques in handling the incoming case-load and industry in processing the cases assigned." On a separate matter, the commendation states: "The one hour instruction on 3101 processing given by you to 24 Adjudication employees was reported to be well received. Your efforts in presenting this important phase of our operation in a clear and concise fashion are appreciated and you are commended." (5) A memo was sent to Mrs. Chandler in May 1969, from Adjudication Officer (M. C. Holland), thanking her for her participation in the Claims Clerk Refresher Training Program. Mr. Holland commends her in the following words: "Your lucid and well-prepared presentation covering the processing of educational assistance claims should prove of material assistance to our Claims Clerks in becoming more proficient in this area." (6) There is a commendation memo to Mrs. Chandler from Authorization Section Chief, Section B (Mrs. Fillerup), dated August 14, 1968, stating "Your cheerful acceptance of extra assignments beyond that of routine adjudication has helped immeasurably to boost morale within the Section." (7) A commendation memo dated November 20, 1967 to Mrs. Chandler from Authorization Section Chief, Section B (Dominic Ballanti) states, "you are to be commended on the spirit of cooperativeness you have displayed during the period you served this Fall as a supervisor in training personnel in education awards. Your knowledge of educational awards, willingness to help others learn, and your effectiveness in getting the task done is greatly appreciated." (8) Although the QSI granted Complainant on October 20, 1972 comes after the promotion action in issue, it is relevant to the extent that it recognizes her for performance before the promotion action of September 17, 1972. The period covered by the recommendation for the QSI is October 1, 1971 to September 30, 1972. The following statements are included in the justification for that award: "Mrs. Chandler has an above aver-

age working knowledge of VA Laws, Regulations and procedures involved in reviewing and approving the work of Senior Adjudicators and Adjudicators in the Section." Mrs. Chandler's job knowledge and her exercise of sound judgment reduces errors and the consequent need for corrections. As an Authorizer she has manifested a high degree of technical knowledge. She has improve the quality of the decisions and actions taken by the Adjudicators working with her. Her guidance and wisdom have earned Mrs. Chandler a respected place in the eyes of her fellow workers."

There is also evidence in the file that Complainant participated extensively in extra-detail assignments.

The QSI which was awarded to her in August 1970 states, "I have observed that Mrs. Chandler has an excellent relationship with personnel within our Division as well as other Divisions. Her contacts with claimants and schools are courteous and cordial which without a doubt improves the image of the VA with the general public. Mrs. Chandler because of her excellent background and knowledge combined with ability to express herself, has frequently been called upon to participate in staff discussions within the regional office. On occasion she has also participated in panel discussions in the news media, including television." (The award justification appears under Complaint File, Exhibit 37). Mr. Holland testified at the hearing that Mrs. Chandler had been sent on extra-details and "comes across well, has a good manner, and does a fine job" (Complaint File, Exhibit 2, p. 5). Mr. Ballanti, speaking of Complainant's performance on extra-detail assignments said, "Having been at these meetings with you, from the way you conducted yourself, the way you handle people, you are definitely a natural for this type of thing." (Hearing Transcript, p. 30).

Two VA Forms 5-4627 (Cumulative Record of Training and Development) in Mrs. Chandler's OPF indicate that

she has had the following courses which relate either directly or closely, to supervision:

1—Performance Evaluation Training

2—Improving Communications with the Public

3—Paid Supervisory Training

4—Creative Problem-Solving

5—Supervising Women for Women

6—Human Factors in Management

It appears that much of what the Complainant did is not only closely associated with supervision but relates directly to the GS-13 Supervisory Veterans Claims Examiner position for which she applied. The position description requires the incumbent to "maintain a satisfactory relationship with employees, staff officials, representatives of other government agencies, Veterans Service Organizations, representatives of organizations doing business with the Veterans Administration and with the general public." (Complaint File, Exhibit 25).

A preponderance of the evidence supports a finding that Complainant, at the time of the promotion action had demonstrated, in greater breadth than Mr. Dineros, her "potential" to perform in a supervisory capacity.

Allegation 3. Mr. Holland stated in his affidavit (Complaint File, Exhibit 2, p. 4) that he definitely checked the sick leave balances of the candidates in this promotion and that he always checks sick leave balances. He stated also, "on the surface, it appeared that Mrs. Chandler's balance was better. But I checked Mr. Dineros' case and found he had used very little sick leave during the past year. He, apparently, had used a lot due to some illnesses in the past." He made substantially the same statement at the hearing (Hearing Transcript, p. 17), saying ". . . while [Mr. Din-

eros'] balance was not high, his sick leave usage for the preceding 12 months had been very low."

A memorandum from Mr. Holland to the Investigator in this complaint, dated October 13, 1972 (Complaint File, Exhibit 29), shows that Mrs. Chandler had a sick leave balance of 999 hours and Mr. Dineros 348 hours. There is no reason to discount Mr. Holland's statement that he reviewed and considered sick leave balances before making a selection from the candidates referred to him. Therefore, I find that Mr. Holland did review Complainant's sick leave balance before making a selection for the position. (This finding is not intended to reflect an opinion by the Examiner that such a practice is a good practice).

Allegation 4. Mr. Holland stated in his affidavit that he assumed Mr. Dineros could read and interpret printouts. (Complaint File, Exhibit 2, p. 6). In answer to further questioning at the hearing on this matter, Mr. Holland said that he did not question candidates about their ability to read computer printouts. He said that he did not know at the time of the selection whether Mr. Dineros could read printouts (Hearing Transcript, p. 22), although it is conceded by him that Section Chiefs should be able to read and interpret computer printouts. (Complaint File, Exhibit 2, p. 6).

Complainant's OPF contains a letter dated July 13, 1971 from Field Director, Area 4, Department of Veterans Benefits, Washington, D. C. commending her for her participation in test of the OCR (Optical Character Recognition) award procedure. The letter states, in part, "We would like to ask that she return for a short period about August 2, 1971, to assist in analyzing and evaluating the output from the computer based on the input data supplied during the week of June 28, 1971."

The VA Promotion Plan requires that the selecting official review the Official Personnel Folders of all employees

referred for interview. (Complaint File, Exhibit 27, p. 8). Since the Complainant was referred for interview, we assume that the selecting official reviewed her OPF. Assuming that he made the review, the letter could have given him some proof of her ability to read and interpret computer printouts. There is nothing in the complaint file or in Mr. Dineros' OPF which would give rise to more than an assumption that he could read and interpret printouts at the time Mr. Holland selected him for the position. Mr. Holland says that Authorizers and Adjudicators should be able to read computer printouts (Complaint File, Exhibit 2, p. 6).

While I cannot conclude on the state of the evidence that Mr. Dineros lacked the ability to read and interpret computer printouts at the time of his selection, I do conclude that the selecting official should have known, as a matter of fact, whether Mr. Dineros had that ability, since it is admitted to be an ability a Section Chief needs. It is clear that Complainant could read and interpret computer printouts.

Allegation 5. Mr. Holland testified that nine of eleven Section Chiefs he supervises do not have law degrees. He also testified that the VA Regional Office, Los Angeles has established law courses for Adjudication Division employees without law degrees in order to give them some familiarity with our system of jurisprudence and to acquaint them with the analytical reasoning process required in law (Hearing Transcript, pp. 21-22). The Complainant does not have a law degree but has completed the course established for employees without degrees. Mr. Dineros has a law degree.

Mr. Holland stated in his affidavit that although a law degree is not necessary for a Section Chief position, it is desirable. He said further, "If we have someone with a law degree, who shows promise, his promotions probably will come faster than if he didn't have it." (Complaint

File, Exhibit 2, pp. 5, 6). However, several other statements by Mr. Holland in the record indicate that he primarily based his selection of Mr. Dineros on his ability "to train, motivate and inspire employees." (Hearing Transcript, pp. 15, 20, 23).

The evidence does not allow a finding that Mr. Holland used Mr. Dineros' law degree to justify selecting him for the Section Chief position.

Allegation 6. At the present time, Mr. Holland supervises two female Section Chiefs, both GS-13, both Caucasian—Mrs. Catherine Weden and Mrs. Margarette Fillerup. Neither of them was selected by him. He stated in his affidavit (Complaint File, Exhibit 2, p. 4): "Mrs. Fillerup was a Section Chief when I came; Mrs. Weden had been an Authorizer and was the Assistant Chief of the Administrative Division. I did concur in her lateral transfer back to Adjudication." Both Mrs. Weden (Hearing Transcript, p. 53) and Mrs. Fillerup (Hearing Transcript, p. 42) testified that Mr. Holland has not treated them differently than their male supervisory peers in terms of official assignments.

From approximately March 1971 to September 1972 (when Mr. Dineros was selected), Mr. Holland participated as selecting official in three promotion actions for GS-13 Supervisory Veterans Claims Examiners. The selections for these positions were made under Promotional Announcements 36-71 and 47-72. Under Announcement 36-71, a Caucasion male was selected; an Oriental male and a Caucasian male were selected under 47-72. (See Hearing Exhibit #1).

When asked what specific qualifications he wanted of the GS-13 Section Chief, Mr. Holland responded: "the individual should be knowledgeable; *he* should have a good knowledge of the work that the people will be performing. He should be able to work with people, to motivate them

and he should be in a position to solve problems." (Hearing Transcript, p. 20).

When the selecting official was asked whether Complainant was deficient in any qualifications he wanted his Section Chief to possess, he responded: "I wouldn't say she was lacking. I would say, in my opinion, in ability to motivate and get along with people I figured Mr. Dineros could do a better job."

Mr. Holland stated in his affidavit: "I'm interested in getting Section Chiefs who will do the best job for the Division. He must know the job, but also must be able to motivate and inspire his staff. I'm not at all concerned with race or sex in filling these positions but only in finding the one who will do the best job." (Complaint File, Exhibit 2, p. 3).

A review of Forms VA 5-4669 (Qualifications Analysis and Assessment of Potential for Supervisory Positions) prepared on Complainant and Mr. Dineros for Announcements 80-72 (the promotion action in question) and 47-72 (an earlier promotion action) reveals that in each promotion action the Complainant was rated one point better than Mr. Dineros in ability to "motivate, train, develop, and guide employees of varied backgrounds and skill levels effectively." Mrs. Fillerup, Mr. Dineros' immediate supervisor, prepared his Forms 5-4669; Mrs. Chandler's were prepared by her immediate supervisor, Gilbert Thompson. The selecting official testified that he knew the supervisory evaluations of the candidates (Hearing Transcript, p. 24).

The evidence shows that during a one-and-a-half year period of time, Mr. Holland did not select a female supervisory staff member. On the three occasions which arose for selecting supervisory Veterans Claims Examiners, he did choose males. This information is hardly indicative enough of a pattern to justify any inferences about Mr. Holland's attitude toward selecting women for supervisory

positions. However, there are other indicators that Mr. Holland had a predisposition for males in supervisory positions:

1. Granted that traditional rules of English grammar approve a generic use of "he" and "his" in proper settings, Mr. Holland's use of "he" and "his" in unnatural settings (pointed out earlier in this decision) indicate that he held preconceived notions about which sex of individuals ought to be in supervisory positions;

2. In spite of the fact that Complainant had demonstrated ability to motivate, train and inspire employees on many more occasions than Mr. Dineros, and in spite of the fact that the Complainant received a better rating in this area than Mr. Dineros, Mr. Holland selected the latter and justified his selection by pointing to his demonstrated ability "to motivate people and get along with them" (Hearing Transcript, p. 23).

3. In spite of Complainant's demonstrated ability to handle extra-detail assignments which are admittedly part of the Section Chief's job, Mr. Holland selected a male who had never performed such assignments.

Recommended Decision

It is my finding that a preponderance of the overall evidence justifies a conclusion that the selecting official discriminated against Complainant because of her sex in not selecting her for the GS-13 Section Chief position. The evidence does not indicate that Complainant's race influenced the decision not to select her for the position.

Recommended Action

I recommend that Complainant be promoted immediately to GS-13 Supervisory Veterans Claims Examiner, effective retroactively to September 17, 1972. When the Agency considers Complainant in future promotion actions, Com-

plainant should receive experience credit as if she *actually occupied* the GS-13 Section Chief position on September 17, 1972.

Further Recommended Action

Factors used in evaluating and selecting candidates for promotion should reflect merit principles. As a rule, there is no correlation between an employee's sick leave balance and ability to perform a job.

A sick leave balance represents only an aggregate number of hours available to be used on occasions where sick leave is warranted. A *balance* says nothing about reasons the balance is low or high or whether the employee has abused leave privileges. Both good employees and poor employees use sick leave.

A sick leave balance simply does not allow one to infer much about an employee's ability. Accordingly, I recommend that the practice of considering sick leave balances in merit promotion actions be discontinued.

/s/ Edna E. J. Francis
Edna E. J. Francis
EEO Complaints Examiner

VETERANS ADMINISTRATION DECISION

VETERANS ADMINISTRATION
Office of General Counsel
WASHINGTON, D.C. 20420

CERTIFIED MAIL

March 21, 1973

Mrs. Jewell D. Chandler
5719 Aladdin Street
Los Angeles, California 90008

Dear Mrs. Chandler:

I am enclosing a copy of the Hearing Transcript and the EEO Complaints Examiner's report concerning your complaint of discrimination because of race or color (Black) and sex (female) filed against the VA Regional Office, Los Angeles, California.

After a careful review of the case record, I concur, in general, with the EEO Complaints Examiner's report. However, the record does not support the EEO Complaints Examiner's Recommended Decision that a preponderance of the overall evidence justifies a conclusion that the selecting official discriminated against you because of your sex in not selecting you for the GS-13 Section Chief position. We do concur with that part of the EEO Complaints Examiner's decision which states that the evidence does not indicate that race influenced the decision not to select you for the position.

In supporting our conclusions, the case will be considered on a breakdown of the allegations in the same format followed by the EEO Complaints Examiner. These allegations to support your complaint of discrimination are:

(1) that she had demonstrated technical proficiency in the three main areas of responsibility for the Section Chief position (compensation, pension, and education claims) whereas the male selected for the position had not demonstrated technical proficiency in all three areas;

(2) that she did not receive due consideration for her "potential" to perform in a supervisory capacity, inasmuch as she had frequently performed many of the responsibilities associated with supervision whereas the male selected for the position had rarely performed supervisory responsibilities and therefore had not demonstrated "potential";

(3) that she was not given due credit for her sick leave balance, as required by the VA Promotion Plan;

(4) that she had the ability to read computer printouts, an ability which is needed in the supervisory position, whereas the male selected for the position lacked that ability at the time of his selection;

(5) that the selecting official gave disproportionate weight to the significance of a law degree, because it enhanced his justification for selecting a male for the position;

(6) that the selecting official had never selected a female for a GS-13 position, and did not wish to select a female supervisor, especially not a black female, for the GS-13 Section Chief position.

In analyzing allegation (1), the facts in the record support a conclusion that you demonstrated a higher degree of technical proficiency in the area of education claims, but does not support any greater proficiency in the areas of compensation and pension. I could find no facts supporting your claim that "the male" selected for the position had not demonstrated technical proficiency in all three areas.

In reference to allegation (2), regarding demonstrated potential for supervisory personnel, it is agreed that the testimony of record supports your claim of a greater breadth in training, extra-detail assignments and self-development activities. While these assignments are valuable in developing an individual for the assumption of supervisory responsibilities, the utilization of these details and self-development opportunities do not of themselves sup-

port a conclusion that you possess an overall "greater breadth of potential" to perform in a supervisory capacity.

We concur with the Complaints Examiner's conclusions with respect to allegation (3), allegation (4) and allegation (5).

In reference to allegation (6), it is shown that during a one and a half year period of time, the selecting official did not select a female supervisor. During this period he had the opportunity on only three occasions. We concur with the Complaints Examiner's conclusion that this is not indicative enough of a pattern to support any inference regarding the selecting official's attitude towards the selection or nonselection of women for supervisory positions. However, we do not agree that the record contains other indications that the selecting official had a predisposition for males in supervisory positions. The selecting official's usage of "he" or "his" are not to be construed as importing only the masculine gender since the terms include the feminine as well. Authority: 1 U.S.C. 1.

The selecting official is entitled to make his selection from any of the candidates on a promotion certificate, whether or not the candidates are presented in rank order, based on his judgment of how well the candidates will perform in the particular job being filled, and, when relative, what their potential is for future advancement. Authority: Federal Personnel Manual, Chapter 335, subchapter 3, paragraph 3.7c. The record is absolutely void of any evidence or testimony in reference to any acts, words, or innuendos, discriminatory in nature, by the selecting official, relating to his selection from the certificate of eligibles furnished him.

It is therefore my decision that discrimination because of race or color (Black) and sex (female) is not substantiated by the evidence concerning the issues raised in your complaint.

If you are dissatisfied with this final decision, you have the following appeal rights:

You may appeal to the Chairman, Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C., 20415, within 15 calendar days of receipt of the decision.

You may file a civil action in an appropriate U. S. District Court within 30 days of receipt of the Commission's final decision.

If you elect to appeal to the Commission, a civil action in a U. S. District Court may be filed within 30 days of receipt of the Commission's final decision.

A civil action may also be filed anytime after 180 days of the date of initial appeal to the Commission if there has not been a final decision rendered.

Sincerely yours,

/s/ KENNETH M. MEYER
Kenneth M. Meyer
Acting Assistant General Counsel

CIVIL SERVICE COMMISSION DECISION

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
WASHINGTON, D. C. 20415

IN THE MATTER OF: JEWELL D. CHANDLER

TYPE CASE: *Complaint of Discrimination (Race and Sex)*

INTRODUCTION

By letter dated April 3, 1973, complainant appealed to the Board of Appeals and Review from a decision of the Acting Assistant General Counsel, Veterans Administra-

tion, issued on or after March 20, 1973, wherein it was found that discrimination in a promotion action because of race or color (black) and sex (female) was not substantiated by the evidence.

Statement of the Case

Complainant is a GS-12 Veterans Claims Examiner in one of the Authorization Sections of the Adjudication Division, Veterans Administration Regional Office, Los Angeles, California. She received an appointment on April 24, 1966 in the Adjudication Division as a GS-7 Claims Clerk, was promoted to GS-9 Veterans Claims Examiner on October 8, 1967, advanced to GS-11 on June 15, 1969, and was promoted to her present position on March 21, 1971.

Complainant applied for a GS-13 Supervisory Claims Examiner (Section Chief) position under Promotional Announcement No. 80-72, which had a filing deadline of August 22, 1972. Although she was one of seven "highly qualified" candidates interviewed for the position, the selecting official chose a male Filipino-American who had been in the division in which the vacancy occurred about 13 years and a GS-12 Authorizer for about 5 years, and whose total score on the examination (167) exceeded complainant's by two points.

An Equal Employment Opportunity Counselor failed to informally resolve complainant's discrimination allegation, and on September 25, 1972, the complainant filed a formal complaint of sex and race discrimination against the selecting official. Based on an investigation conducted between October 10, 1972 and October 25, 1972, a report was submitted to the Equal Employment Opportunity Officer on the latter date, in which it was concluded that the evidence did not support the allegations of sex and race discrimination against complainant or general allegations of sex and race discrimination and inequality in employment in the Division, but that certain personnel practices

needed to be changed in order to alleviate such feelings among minority employees.

A copy of the report was provided complainant, but a satisfactory adjustment could not be achieved based on this report and complainant requested a hearing, which was held on January 26 and 29, 1973. The Complaints Examiner who held the hearing found that a preponderance of the overall evidence justified the conclusion that the selecting official had discriminated against complainant because of her sex in not selecting her for the GS-13 Section Chief position, but that the evidence did not indicate that complainant's race had influenced the decision.

The Complaints Examiner recommended that complainant be promoted retroactive to September 17, 1972, and that consideration of sick leave balances in merit promotion actions be discontinued. However, in his decision, the Acting Assistant General Counsel disagreed with the findings on three of the six allegations made by complainant and also found that the record did not support the conclusion that the selecting official had discriminated against complainant because of her sex.

Representations To The Board of Appeals and Review

Complainant requests that the Board of Appeals and Review concur in the recommendation of the Complaints Examiner. She takes issue with the findings of the agency on three of her allegations while reiterating her belief that the selecting official has discriminated on the basis of both race and sex. A copy of her letter of appeal was sent to the agency on May 2, 1973, but no response has been received from the agency.

Analysis and Findings

The record shows that the six allegations made by the complainant and considered by the Complaints Examiner and the agency are as follows:

(1) that she had demonstrated technical proficiency in the three main areas of responsibility for the Section Chief position (compensation, pension, and education claims) whereas the male selected for the position had not demonstrated technical proficiency in all three areas;

(2) that she did not receive due consideration for her "potential to perform in a supervisory capacity, inasmuch as she had frequently performed many of the responsibilities associated with supervision whereas the male selected for the position had rarely performed supervisory responsibilities and therefore had not demonstrated "potential";

(3) that she was not given due credit for her sick leave balance, as required by the agency's promotion plan;

(4) that she had the ability to read computer printouts, an ability which is needed in the supervisory position, whereas the male selected for the position lacked that ability at the time of his selection;

(5) that the selecting official gave disproportionate weight to the significance of a law degree, because it enhanced his justification for selecting a male for the position; and

(6) that the selecting official had never selected a female for a GS-13 position, and did not wish to select a female supervisor, especially not a black female, for the GS-13 Section Chief position.

The agency stated, with regard to complainant's allegation (1), that "I could find no facts supporting your claim that 'the male' selected for the position had not demonstrated proficiency in all three areas [of work in the section supervised by the selectee]." Complainant cites testimony by the selecting official and a section chief that the male selectee had not worked in the education claims adjudication area. The record shows that, while the selecting official testified at the hearing that the selectee had never worked in education claims adjudication, he also testified that the

selectee needed only to be "familiar enough [with the work performed in the section] to know what the employee is doing, changes going on, and know where to get the information if he does need it." The selecting official further testified that the selectee had an "overall familiarity" with education claims adjudication.

In its finding on complainant's allegation (2), namely, that she did not receive due consideration for her "potential" to perform in a supervisory capacity, the agency stated:

> . . . it is agreed that the testimony of record supports your claim of a greater breadth in training, extra-detail assignments and self-development activities. While these assignments are valuable in developing an individual for the assumption of supervisory responsibilities, the utilization of these details and self-development opportunities do not of themselves support a conclusion that you possess an overall "greater breath of potential" to perform in a supervisory capacity.

Complainant rejoins that she has actually been assigned and has performed the duties of a supervisor as shown by the testimony of a Section Chief. She also cites testimony of a co-worker that he had found complainant a better supervisor than selectee. The Board notes, however, that the selecting official testified at the hearing that he felt the selectee "could best do the job we needed done" and "could motivate people." While the complainant received a slightly higher overall rating on her appraisal for performance in supervisory positions (53 points on two occasions, as compared to 50 and 52 points received by the selectee), the Board does not believe that this, in itself, indicates that the complainant was better suited for the supervisory position in question, or that her nonselection necessarily was the result of discrimination on the basis of sex or race. In addition, the Board notes that the selectee received a more favorable rating than the complainant with respect

to ability to "motivate, train, develop, and guide employees of varied backgrounds and skill levels effectively".

The record shows that the agency concurred in the following findings of the Complaints Examiner with respect to complainant's third, fourth, and fifth allegations: (3) that the selecting official did review complainant's sick leave record before making his selection; (4) that, while the record did not show whether the selectee could read and interpret computer printouts at the time of his selection, the selecting official should have known (although he did not know) whether the selectee possessed this ability; and (5) that the evidence did not show that the selecting official used the selectee's possession of a law degree to justify the selection. The Board notes that complainant has raised no issue concerning these findings, and that the second finding described above does not, in itself, support a finding that the selection in question was based on considerations of race or sex.

Allegation (6) (that the selecting official had never selected a female for a GS-13 position and did not wish to select a female supervisor, especially a black female) was found supported by the Complaints Examiner, not because on 3 occasions over a 1½ year period the selecting official had selected 4 males, but because other alleged indicators showed that the selecting official has a "predisposition" for selecting males for supervisory positions. The Complaints Examiner considered that the 4 selections were too few instances over too short a period to be considered a pattern.

The agency disagreed that the cited indicators showed a predisposition for males in supervisory positions while complainant feels that the three occasions on which the Adjudication Officer selected 4 non-black males (2 Caucasians and 2 Orientals) does show a pattern of discrimination. She points out that, while possession of a law degree had been given as a reason for selecting her competitor,

on each of these occasions qualified blacks with law degrees were eligible candidates for promotion and were not selected. She cites as evidence of the selecting official's bias towards men his introductions of male officials to her as "Mr." whereas she was introduced to them without title. Complainant refers to testimony of two female Caucasian grade GS-9 Veterans Claims Examiners which allegedly shows the selection official's "practice in promoting males with little proven ability vs females with proven outstanding ability". She claims that the selecting official falsely rationalized his nonselection of blacks as supervisors on the ground that white employees will not accept supervision from a black employee.

The division in which the vacancy in question occurred has 276 employees, including 180 Caucasians, 69 Negroes and 27 of other minority designations. Hearing Exhibit #1 shows that during a 2-year period the selecting official had selected 83 employees for promotion including 41 Caucasians, 28 Negroes and 14 others. Thus, the 65% Caucasian workforce received only 50% of the promotions whereas the 25% Negro workforce received 34% of the promotions and the 10% other category received 16% of the promotions. However, of the 37 promotions to grades GS-9 through -13, Caucasians received 22 or 57%, Negroes received 8 or 22%, and 7 or 19% went to the other category. Complainant was 1 of the 2 blacks promoted to grade GS-12.

Of the 276 employees, 85 or 30% were female. Of the 83 promotions, 32 or 39% were received by females. However, of 37 promotions to grades GS-9 through -13, females received only 6 or 16%. Complainant was 1 of 2 women promoted to grade GS-12. Statistically, it is clear that as a black, and even more so as a female, complainant was in a category least likely to be promoted to a position at grade GS-9 or above.

The Personnel Management Specialist servicing the division testified that principal sources of Veterans Claims Examiners are eligibles for the Federal Service Entrance Examination (FSEE) who enter at grades GS-5 and -7 and Veterans Claims Clerks who begin at grade GS-3. There are relatively few minority or non-degree eligibles on the FSEE registers and a much higher proportion among clerical personnel. The promotion policy is to give preference to those with law degrees, and a much higher proportion of men than women employees of the division have law degrees. The reason for the seeming imbalance of women and blacks in the higher grade levels appears to be the preference in appointments and promotions given those with higher education, a legitimate qualifications matter and not a prohibited type of discrimination. The Board does not concur in the finding of the Complaints Examiner that the record shows that the selecting official is predisposed toward selecting men for supervisory positions.

To summarize, the main evidence that the selecting official discriminated against complainant in not selecting her over the male selectee is the inconsistency of his explanation that the main reason for the selection was his belief in the ability of the selectee to motivate employees whereas he had previously concurred in assigning complainant a higher rating on ability to motivate employees. The Board notes, however, that on the whole blacks and women have fared relatively well in promotions received in the division, and that there are two white female GS-13 Section Chiefs, one of whom received her position before the selecting official was assigned to his present position, but the other of whom was reassigned laterally with the concurrence of the person acting as selecting official for the promotion in question.

In view of the foregoing, the Board finds that the evidence of record does not support a finding that the agency's failure to promote the complainant resulted from discrimination on the basis of race or sex.

Decision

The previous decision of the Acting Assistant General Counsel, Veterans Administration, is hereby affirmed. Under the Civil Service Regulations, a decision of the Board of Appeals and Review is final and there is no further administrative appeal. However, if the complainant is not satisfied with this decision, she is authorized by Section 717(c) of the Civil Rights Act, as amended, to file a civil action in an appropriate U. S. District Court within thirty (30) calendar days of her receipt of this decision.

For the Commissioners:

/s/ William P. Berzak
William P. Berzak
Chairman

July 18, 1973

OPINION OF THE DISTRICT COURT
(Filed December 31, 1973)

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division
REX HEESEMAN
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1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-3551

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL No. 73-1863-MML

Findings of Fact and Conclusions of Law

JEWELL D. CHANDLER, *Plaintiff*,

v.

DONALD E. JOHNSON, ETC., ET AL., *Defendants*.

The Court, after a hearing on December 21, 1973, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

Plaintiff, pursuant to Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. 2000e *et seq.*, instituted the instant action challenging the decision of defendants and

the Civil Service Commission that she was not discriminated against in the selection of a GS-13 Supervisory Claims Examiner at an office of the Veterans Administration (VA) in Los Angeles, California.

II

After plaintiff applied for said position, defendants followed an extensive procedure in ascertaining which of the many candidates should fill this position. Although plaintiff was one of several highly-qualified candidates, the selection official chose a male Filipino-American, Mr. Dineros.

III

An Equal Employment Opportunity Counselor failed to informally resolve plaintiff's discrimination allegation, and on September 25, 1972, plaintiff filed a formal complaint of sex and racial discrimination against the selection official, Mr. Holland.

IV

Based on an investigation, a report was submitted to the Equal Employment Opportunity Officer in which it was concluded that the evidence supported neither the allegations of sex and race discrimination against plaintiff, nor the allegation of general sex and race discrimination within the Division, but that certain personnel practices needed to be changed in order to alleviate such feelings among minority employees. A satisfactory adjustment could not be reached with plaintiff based on this report and she requested a hearing.

V

A hearing was held on January 26 and 29, 1973 wherein the Civil Service Complaints Examiner (Examiner) found that a preponderance of the over-all evidence justified the conclusion that the selecting official had discriminated

against plaintiff because of her sex in not selecting her for the GS-13 position, but that the evidence did not indicate that plaintiff's race had influenced the decision.

VI

On review, the VA's Acting Assistant General Counsel, Mr. Meyer, concluded that, while the record supported some of plaintiff's allegations and the Examiner's belief that the evidence did not indicate that race influenced the deci sion, the record failed to support plaintiff's other allegations and the Examiner's recommended decision that a preponderance of the over-all evidence justified a conclusion that the selecting official discriminated against plaintiff because of her sex. In this regard, the Examiner's recommended decision was overturned.

VII

On April 3, 1973, plaintiff appealed the VA's decision to the Board of Appeals and Review of the United States Civil Service Commission. The Board affirmed the VA's decision on June 12, 1973.

VIII

Plaintiff thereafter filed the instant action.

CONCLUSIONS OF LAW

I

The Court has jurisdiction over the parties and the subject matter of the instant action. (Defendants challenged, by means of a motion to dismiss, the inclusion of two of the named defendants; the Court does not reach this matter because of the disposition of this case as stated herein.)

II

The scope of judicial review in Section 2000e-16 cases has not been litigated to a great extent since the enactment

of this legislation. After reviewing the existing authorities and the legislative history, the Court is persuaded by the rationale of *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973) and accordingly adopts the scope of judicial review expressed in that case.

III

Applying the preceding scope of judicial review to the instant action, the Court finds that the absence of discrimination is firmly established by the clear weight of the administrative record and hence plaintiff is not entitled to any relief.

IV

The Court concludes that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. Judgment should therefore be entered in favor of defendants and against plaintiff.

DATED: This 27 day of December, 1973.

/s/ MALCOLM M. LUCAS
Malcolm M. Lucas
United States District Judge

PRESENTED BY:

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division
REX HEESEMAN
Assistant U.S. Attorney

Attorneys for Defendants

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1596

OPINION

JEWELL D. CHANDLER, *Appellant*,

v.

DONALD E. JOHNSON, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF VETERANS AFFAIRS, VETERANS ADMINISTRATION; GORDON R. ELLIOTT, IN HIS OFFICIAL CAPACITY AS DIRECTOR, VETERANS ADMINISTRATION, LOS ANGELES REGIONAL OFFICE; MARTIN C. HOLLAND, IN HIS OFFICIAL CAPACITY AS ADJUDICATIONS OFFICER, VETERANS ADMINISTRATION, LOS ANGELES REGIONAL OFFICE; AND THE UNITED STATES OF AMERICA, *Appellees*.

[April 25, 1975]

Appeal from the United States District Court
for the Central District of California

Before: TRASK, CHOY, *and* GOODWIN, *Circuit Judges*.

GOODWIN, *Circuit Judge*:

Jewell Chandler, a black, female employee of the Veterans Administration, appeals from a summary judgment denying judicial relief under Section 717 of Title VII of the Civil Rights Act of 1964, as added by Section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

Appellant alleges that the VA denied her a promotion because of her sex and race. She exhausted her administrative remedies within the VA and the Civil Service Commission before beginning this action. The district court found no substantial defects in the agency proceedings.

Appellant has been employed since 1966 in the Adjudication Division, Los Angeles Region. She received five promotions in six years. In 1972, she was one of seven examiners (GS-12) interviewed for the position of Supervisory Veterans Claims Examiner (GS-13). Appellant was one of three finalists, but a Filipino-American male received the promotion.

In a two-day hearing called pursuant to 5 C.F.R. §713.217, a complaints examiner heard ten witnesses. Other witnesses requested by appellant were not called because she did not show that they would add anything material to the record. Appellant chose to represent herself. She failed to produce objective evidence of discrimination, but the complaints examiner, in a twenty-page recommended decision, concluded that appellant was better qualified for the promotion than the person selected. The examiner found that the selecting official had discriminated against appellant because of her sex. The examiner found no evidence of racial bias. The decision recommended that appellant be promoted to the GS-13 position retroactively to September 17, 1972.

Pursuant to Civil Service regulations, the recommended decision and the hearing record were sent to the head of the VA for final agency decision. In a letter dated March 21, 1973, Mr. Kenneth Meyer, acting assistant general counsel of the VA, rejected the complaints examiner's recommendation, stating that the finding of sex discrimination was not "substantiated by the evidence."

Appellant appealed to the Civil Service Commission Board of Appeals and Review. On July 18, 1973, the board affirmed the agency decision. This litigation followed.

The appellant raises four questions: (1) Whether the delegation of reviewing authority within the VA to the assistant general counsel constituted a fatal defect in the administrative review. (2) The legal sufficiency of the assistant general counsel's reasons for rejecting the claim.

(3) The sufficiency of the administrative record. (4) The right to trial de novo in the district court.

I.

While there may have been some ambiguity in VA regulations at the time the acting assistant general counsel rejected appellant's claim, a matter we need not decide, we can find no substantive reason for holding that the delegation of reviewing authority "to the general counsel or his designee" denied the appellant the quality of agency review contemplated in the regulations implementing Title VII.

A CSC regulation, 5 C.F.R. § 713.221(a), provides that when an alleged violation of Title VII occurs in a federal agency, the head of the agency *or his designee* shall decide whether the agency will adopt, reject, or adopt with modifications the recommended decision of the complaints examiner. A VA regulation, 38 C.F.R. § 2.6(e)(6), delegated Title VII authority from the agency head to the general counsel or *his* designee. If there were, as appellant claims, inconsistent regulations in effect in 1973, she has not cited the C.F.R. references, and the government represents that the inconsistencies, if any, have been cured. In any event, the delegation question presents nothing of substance in this case.

Appellant relies on *United States* v. *King*, 478 F.2d 494 (9th Cir.), *cert. denied, sub nom. Light* v. *United States*, 414 U.S. 846 (1973), where we held that statutory guidelines in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516, prohibit the attorney general and his specially designated assistant attorneys general from redelegating the authority to authorize wiretaps. Here, unlike in *King*, we find no evidence of a legislative policy to limit reviewing authority to specific officials or to officials of a specific level in the bureaucracy. Indeed, it would be counterproductive and unnecessarily restrictive to subject government-employee Title VII cases to uncertainty and

delay in exhausting administrative remedies because of a nonprejudicial ambiguity in the delegation of reviewing authority within the agency. The district court was correct in refusing to find a fatal defect in the agency's delegation procedure.

II.

Appellant next asserts that the decision letter by which she received notice of final agency action rejecting her claim was fatally defective because it did not "set forth the specific reasons in detail for rejection * * *." 5 C.F.R. §713.221(b)(2).

Appellant also contends that she made at least a prima facie case before the complaints examiner, as demonstrated by the examiner's finding of discrimination. (When an employee establishes a prima facie case of discrimination, the employer must articulate some "legitimate, non-discriminatory reason" for its action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).)

Appellant points to the statement in the decision letter that "the record is absolutely void of any evidence or testimony in reference to any acts, words, or innuendos, discriminatory in nature, by the selecting official * * *," as evidence that Mr. Meyer rejected the complaints examiner's recommended decision for the wrong reason, *i.e.*, because appellant had failed to prove a specific overt intent to discriminate. (Title VII proscribes "subtle as well as overt discrimination, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 801, and it forbids employment practices with discriminatory consequences as well as discriminatory designs. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).)

Appellant is correct in asserting that she was entitled to an affirmative statement of nondiscriminatory reasons for the selection of another applicant. She is also correct in her assertion that she was under no duty to prove a specific

intent to discriminate against her. However, the Meyer letter, as well as other documents in the administrative file, contains statements of nondiscriminatory reasons for the VA decision, and the administrative record on the whole shows that appellant did not lose her case because of an erroneous belief by Mr. Meyer that she had a higher burden of proof than the law requires.

Notwithstanding any flaws in the Meyer letter, the administrative record showed that the man who was promoted had several years of seniority both in grade and in the division, and a numerical score two points higher than appellant's on a grading system that was not shown to have been discriminatory. The Civil Service Commission Board of Appeals and Review noted these points in its decision, which was a part of the administrative record examined by the district court. These points constituted a legitimate, nondiscriminatory reason for the challenged personnel action.

Indeed, other than the facts that appellant was female and that the person promoted was male, there was no evidence to support appellant's assertion of sex discrimination. She testified at length about her opinions on racial discrimination, as did her supporting witnesses, but no witness produced evidence that would support a claim of sex discrimination. The examiner rejected the claim of racial discrimination.

The examiner allowed the claim of sex discrimination on the basis of unexplained statistics. Three persons, all male, were promoted from grade 12 to grade 13 during the 18 months in which the supervisor whose decision was challenged had the principal responsibility in such promotions. There was no evidence, however, to rebut the supervisor's statement that those promoted were the best qualified. There was no evidence that qualified women even competed for these promotions, much less that any qualified woman was rejected in favor of a less qualified man.

Every reviewing authority, plus the district court, has agreed that the record made before the complaints examiner did not support the finding of sexual discrimination. And the complaints examiner correctly found no basis for the allegation of racial bias.

We have examined the record, and we agree that there is no substantial evidence to support appellant's claims. Appellant's opinion and the opinions of those who agree with her add nothing to the allegations in the complaint. In view of our conclusion that appellant's charges before the examiner were fully answered by the evidence presented by the VA, the district court correctly held that the administrative decisions were not so defective in their form, or so unsupported by the record, as to require the court to set them aside.

III.

The appellant contends that, whether or not the administrative proceedings satisfied the requirements of Title VII, she is entitled to a trial de novo in the district court. She also contends that, at a minimum, she is entitled to an opportunity in court to supplement the administrative record.

The VA contends that the district court's role is limited to review of the administrative decision to assure that it was not arbitrary or capricious, that there were no procedural infirmities, and that it is supported by substantial evidence.

The district court correctly rejected both polar positions. It adopted and applied the intermediate scope of inquiry expounded in *Hackley* v. *Johnson,* 360 F. Supp. 1247 (D.D.C. 1973), *appeal pending, sub nom. Hackley* v. *Roudebush* (D.C. Cir. No. 73-2072).

Both parties and amicus curiae thoroughly briefed the complicated legislative history of § 717, which in 1972 ex-

tended the protections of Title VII of the Civil Rights Act of 1964 to federal employees. After careful examination of the statute and its legislative history, we agree with the *Hackley* trial court that if Congress had any intent on the role of the district courts in § 717 cases, it failed to disclose it. *See Hackley* v. *Johnson,* 360 F.Supp. at 1250.

The district court's role in Title VII actions by federal employees is not the same as that in Title VII actions by private employees. A private employee is entitled to a plenary hearing. *McDonnell Douglas* v. *Green,* 411 U.S. at 798-799; *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974).

We believe Congress intended to assure federal and private employees equivalent, but not identical, judicial remedies under Title VII. The remedies differ because Congress created different administrative processes for these two classes of employees. *Cf. Bowers* v. *Campbell, et al.,* .... F.2d .... (9th Cir. October 24, 1974).

With this objective in mind, the district judge faced with a demand for a trial de novo is entitled to determine, at a pretrial conference or otherwise, why the plaintiff believes that a trial de novo is necessary. Without, at this time, attempting to canvass all the possibilities in this rapidly expanding branch of the law, a plaintiff might show that the administrative record is inadequate, or that the hearing officer cut short the proceedings in a manner that prevented a fair presentation of the plaintiff's case; or that without judicial discovery, a case could not be made. Other possibilities will no doubt be advanced.

Here, the district court was presented with a verbatim transcript of a hearing and a comprehensive civil service review. There was no material flaw in the administrative record on its face; and nothing of substance in appellant's challenge to the administrative proceedings. There was nothing before the district court to indicate that a useful purpose would be served by having a trial de novo. We find

no abuse of discretion in the decision not to have a trial de novo.

On the score of reopening the record to permit the taking of more testimony, again appellant presented nothing before the district court to indicate that a reopening would produce anything of substance. Additional opinions of coworkers (that members of minority races did not fare as well in promotions as did whites) might have been brought in. But to the extent that this observation may have been relevant, it was fully explored in the administrative hearing. Again, there was no offer of proof or suggestion that new and material evidence likely to produce a different result would be forthcoming if the record were reopened. Accordingly, we find no abuse of discretion in the decision by the district court not to reopen the administrative record.

Where the administrative record affirmatively shows, as it did here, that the challenged personnel action was based upon nondiscriminatory reasons; and where, as here, the record on its face appears to be the product of a fair and impartial hearing; and where, as here, the appellant fails to point out a prejudicial defect in procedure or evidentiary deficits that should be remedied in court, the district court commits no error in deciding the case on the administrative record.

Affirmed.

OPINION OF THE THIRD CIRCUIT IN SPERLING v. UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1533

ANTON E. SPERLING
70 Reeds Road, New Shrewsbury, New Jersey 07724
Appellant,

v.

UNITED STATES OF AMERICA
c/o Attorney General
Washington, D.C. 20415

ROBERT F. FROEHLKE
Secretary of the Army
The Pentagon
Washington, D.C. 20301

ROBERT E. HAMPTON, *Chairman*
U.S. Civil Service Commission
1900 E Street, N.W.
Washington, D.C. 20415

MAJOR GENERAL HUGH F. FOSTER, JR.
Commanding General
U.S. Army Electronics Command
Fort Monmouth, New Jersey 07703

MALCOLM R. MACKENZIE
Civilian Personnel Officer
U.S. Army Electronics Command
Fort Monmouth, New Jersey 07703

EDWARD M. KRONISCH
Project Managers Office
AACOMS, Building 2525, U.S. Army Electronics Command,
Fort Monmouth, New Jersey 07703

and LUDWIG J. ANDOLSEK, and JAYNE BAKER SPAIN, the *Vice Chairman* and *Commissioner* respectively of the United States Civil Service Commission, 1900 E Street, N.W., Washington, D.C. 20415
Appellees

(D.C. Civil Action No. 1403-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSEPH MEEHAN, Esquire
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Attorneys for Appellees

Argued January 24, 1975

Before: VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

OPINION OF THE COURT

(Filed April 18, 1975)

GIBBONS, *Circuit Judge*

This appeal, involving a claim of job discrimination by the federal government, brings before us for the first time important questions concerning the proper construction and application of the civil remedy afforded to federal

employees in the district courts by § 717(c) of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 111, 42 U.S.C. § 2000e-16(c), *amending* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, 42 U.S.C. § 2000e *et seq.*

The Act mandates that all personnel actions affecting employment in the federal government are to be free from discrimination based on race, color, religion, sex, or national origin,[1] and provides the Civil Service Commission with broad remedial authority to insure that this explicit mandate will be carried out. The Act designates the Civil Service Commission as the administrative agency to review the claims of aggrieved federal employees or applicants for federal employment.[2] Recognizing that private sector employees dissatisfied with the fact-finding or the conciliation procedures of the Equal Employment Opportunity Commission (EEOC) in Title VII actions are authorized to press their claims in the federal district courts, 42 U.S.C. § 2000e-5(f)-(k), the Act also provides a civil remedy in the district courts to federal employees dissatisfied with Civil Service Commission (CSC) review of their claims.[3]

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[1] § 717(a), 42 U.S.C. § 2000e-16(a) provides in part:

"All personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

[2] § 717(b), 42 U.S.C. § 2000e-16(b) provides in part:

"Except as otherwise provided in this subsection, the Civil Service Comission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. . . ."

[3] § 717(c), 42 U.S.C. § 2000e-16(c) provides:

"Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

§ 717(d), 42 U.S.C. § 2000e-16(d) provides:

"The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

Appellant Anton E. Sperling, a career employee in federal service filed suit in the district court pursuant to § 717(c). He appeals here from an order of the district court which granted the government's motion for summary judgment. Sperling had been employed as a civilian writer by the United States Army Electronic Command at Fort Monmouth, New Jersey (ECOM) since 1957. At ECOM, Sperling served as Executive Vice-President of Lodge 1904 of the American Federation of Government Employees (AFL-CIO), and as the union's grievance representative in Equal Employment Opportunity proceedings at the Fort. In that capacity, Sperling, a white man, represented a black ECOM employee in a series of discrimination grievance proceedings from 1965 through 1967. Sperling claims that he was denied a promotion to a GS-13 position in November, 1968, in retaliation for his successful representation, as union grievance delegate, of the black ECOM employee. Sperling pressed his own claim through the administrative process by filing a series of five complaints between March, 1968 and October, 1969, culminating in an

adverse decision by the Board of Appeals and Review of the United States Civil Service Commission on July 15, 1972. On August 15, 1972 he filed suit in district court.

Sperling's amended complaint joins as defendants the Secretary of the Army, civilian and military personnel employed by the Department of the Army, the Commissioners of the United States Civil Service Commission, and the United States. The principal relief sought is a retroactive promotion to a GS-13 employment level together with back pay, and all other attendant rights and benefits for that level from December, 1968. Sperling also seeks an award of counsel fees.

Jurisdiction before the district court was alleged pursuant to the Federal question statute, 28 U.S.C. § 1331; the Civil Rights Act, 28 U.S.C. § 1343; the Tucker Act, 28 U.S.C. § 1346(a)(2); the Mandamus Statute, 28 U.S.C. § 1361; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; the Administrative Procedure Act, 5 U.S.C. § 702; the Back Pay Act, 5 U.S.C. § 5596; and the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

On August 20, 1973, the government moved to dismiss Sperling's complaint for failure to state a claim upon which relief could be granted, and, alternatively, moved for summary judgment. Sperling opposed the government's motions, and on October 16, 1973, filed a cross-motion for summary judgment. Sperling's position, both before the district court and on appeal, is that the administrative record leaves no fact issue as to a showing of the government's discrimination against him, and hence entitlement to relief. If, however, this court concludes that there is a fact issue as to discrimination, Sperling's position is that he is entitled to a *de novo* hearing in the district court on that issue. In the alternative, he is agreeable to having the determination made on the administrative agency record without an additional evidentiary hearing. The government's position

before the district court, and on appeal, is (1) that the decision of the Board of Appeals of the Civil Service Commission is final; or (2) that if there is any judicial review it is limited to a determination that administrative due process had been afforded; or (3) that if any factual review is permitted it is limited to determining whether substantial evidence in the administrative record as a whole supports the Commission's findings.

The district court concluded that it had jurisdiction under the Tucker Act, but that the scope of judicial review available under that jurisdictional grant was limited to determining whether substantial evidence supported the Commission's findings.[4] Alternatively, it held that if the suit was cognizable under § 717(c) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c), which the government disputed, its scope of review was limited to determining whether administrative due process was afforded by the agency.[5]

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[4] The court wrote:

> "Regardless of whether the allegations of plaintiff are based on discrimination or simply failure to follow appropriate administrative regulations, there is substantial evidence to support the Civil Service Commission finding that the plaintiff was not improperly denied promotional opportunity and that the action of the agency was not arbitrary or capricious." (5 App. at 1267).

The district court probably erred in concluding that it had Tucker Act jurisdiction, since 28 U.S.C. § 1346(a)(2) limits that jurisdiction to claims not exceeding $10,000. Sperling's claim appears to exceed that amount even without regard to the prayer for counsel fees.

[5] The court wrote:

> "However, the scope of review for claims of discrimination in federal employment based on 42 U.S.C. Sec. 2000e-2 *et seq.*, Executive Order 11491 and presumably Executive Order 11478 is even more limited. Assuming arguendo that plaintiff's claim is cognizable under either the Equal Opportunity Act, 42 U.S.C. Sec. 2000(e), *et seq.* and (or) Executive Order 11478, this court need only determine whether administrative

The 1972 Act

The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, extensively revised the employment discrimination provisions of Title VII of the Civil Rights Act of 1964.[6] The 1972 Act added a new § 717 to Title VII making it clear that the federal government is obligated to insure that all personnel actions be free from discrimination based on race, color, religion, sex or national origin, § 717(a); vesting in the United States Civil Service Commission the authority to enforce these prohibitions by appropriate remedies and through its rule-making power, § 717(b); and affording to persons aggrieved, a civil remedy in the district courts, § 717(c).[7] The interrelationship of § 717 with existing remedies for public and private employment discrimination, the cross-reference in § 717(d) to other provisions in Title VII,[8] and the legislative compromises in Congress which resulted in the present language, coincide to produce an unusually difficult complex of problems in statutory interpretation.

An appropriate starting point is the framework of Title VII of the Civil Rights Act of 1964. As enacted, Title VII did not extend to employment in the federal government,[9]

due process has been accorded to the alleged discriminatee, i.e. whether a fair and open hearing with the right of confrontation and cross-examination was accorded on the discrimination charges." (5 App. at 1267-68).

[6] Pub. L. No. 88-352, 42 U.S.C. § 2000e *et seq.*

[7] See notes 1-3 *infra.*

[8] See note 3 *infra.*

[9] The definition in 42 U.S.C. § 2000e(b) specifically excluded the federal government from coverage:

> "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1)

but rather afforded a civil remedy in the district courts to victims of discrimination in the private sector once conciliation of their claims had been sought with the Equal Employment Opportunity Commission (EEOC).[10] However, the EEOC was given no authority to seek judicial enforcement of these conciliation agreements. Absent some means of enforcement, the EEOC, in the eyes of many members of Congress, failed even to come close to achieving the Act's goal of eliminating employment discrimination in the private sector. Those Congressmen advocating a strengthened EEOC pressed for a cease and desist enforcement authority to be vested in the Commission. However, out of compromise, the 1972 Act amending Title VII authorized only judicial enforcement of EEOC orders,[11] while preserving the existing civil remedy for an aggrieved private sector employee in the district court.[12]

Congress, in considering the amendment of Title VII, was also concerned with discrimination in public employment. Although Title VII of the 1964 Act had not been extended to federal employees, a number of other statutory provisions,[13] Executive Orders,[14] and Civil Service Com-

the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5)...."

[10] Act of July 2, 1964, Pub. L. No. 88-352, § 706(a)-(k), 78 Stat. 259-61.

[11] § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), *formerly,* Pub. L. No. 88-532, § 706(e), 78 Stat. 260. Both the original Senate and House proposals would have vested a cease and desist authority in the EEOC. See notes 54 and 60 *infra.*

[12] § 706(f)(1)-(5), 42 U.S.C. § 2000e-5(f)(1)-(5).

[13] *E.g.,* Federal Antidiscrimination in Employment Act, 5 U.S.C. § 7151 *et seq.* Section 7151 provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination

mission regulations, [15] all of which were in force by 1972, had already prohibited discrimination in such employment on account of race, color, religion, sex or national origin. There was, moreover, a longstanding back pay remedy available to federal workers.[16] Despite these provisions, the House Committee charged with the responsibility of preparing a revision of Title VII concluded that progress in eliminating discrimination in federal employment had been "far from satisfactory."[17] It attributed such lack of progress to structural defects in the procedures which the gov-

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because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy."

In addition, the prohibition against discrimination by the federal government based upon the due process clause of the fifth amendment was judicially recognized in Bolling v. Sharpe, 347 U.S. 497 (1954).

[14] A policy of antidiscrimination in government employment has been assured by a series of Executive Orders dating back at least to 1948. See Exec. Order 9980, 3 C.F.R. 720 (1948) [1943-48 Comp.]; Exec. Order 10590, 3 C.F.R. 237 (1955) [1954-58 Comp.]; Exec. Order 10925, 3 C.F.R. 448 (1961) [1959-63 Comp.]; Exec. Order 11246, 3 C.F.R. 339 (1965) [1964-65 Comp.]. Exec. Order 11478, 3 C.F.R. 803 (1969) [1966-70 Comp.], reported in 42 U.S.C. § 2000e note, became effective on August 7, 1969. The preamble to the Order states:

> "It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality."

[15] The Civil Service Commission regulations which implemented Executive Order 11478 became effective on January 1, 1971. 5 C.F.R. § 713.201 *et seq.*

[16] Back Pay Act, 5 U.S.C. § 5596.

[17] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971), reprinted in 2 U.S. Code Cong. & Admin. News 2158 (1972).

ernment regulations established for processing complaints,[18] and to a lack of confidence on the part of federal employees in the performance of the Civil Service Commission.[19] The principal defect in the prior system was that the very same federal agency charged with a discriminatory act conducted its own conciliation, investigation and until recently, its own adjudication of the claim.[20] Appeals

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[18] "A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. The defect, which existed under the old complaint procedure, was not corrected by the new complaint process. The new procedure, intended to provide for the informal resolution of complaints, has, in practice, denied employees adequate opportunity for impartial investigation and resolution of complaints." 2 U.S. Code Cong. & Admin. News 2158-59 (1972).

[19] "Testimony reflected a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees. Complainants were skeptical of the Civil Service Commission's record in obtaining just resolutions of compaints and adequate remedies. This has discouraged persons from filing complaints with the Commission for fear that it will only result in antagonizing their supervisors and impairing any hope of future advancement.

Aside from the inherent structural defects the Civil Service Commission has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination which exist in the system. The revised directives to Federal agencies which the Civil Serivce Commission has issued are inadequate to meet the challenge of eliminating systemic discrimination. . . ." Id. at 2159

[20] "Under the revised procedure, effective July 1, 1969, the agency is still responsible for investigating and judging itself. Although the procedure provides for the appointment of a hearing examiner from an outside agency, the examiner does not have the authority to conduct an independent investigation. Further, the conclusions and findings of the examiner are in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists. Although the complaint procedure provides for an appeal to the Board of Appeals and Review in the

from the final decision of an agency to the Civil Service Commission's Board of Appeals and Review, the House Report concluded, rarely resulted in a reversal of an agency decision.[21] The House Committee on Education and Labor proposed, in H. R. 1746, to eliminate these deficiencies by vesting enforcement of the prohibition against discrimination in federal employment in the EEOC rather than in the Civil Service Commission, and by affording federal employees the same civil remedies which were afforded to employees in the private sector.[22]

While the House was considering H.R. 1746, the Senate Committee on Labor and Public Welfare was considering

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Civil Service Commission, the record shows that the Board rarely reverses the agency decision.

The system, which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest." *Id.*

[21] *Id.* at 2159.

[22] The House Committee Report stated:

"Accordingly there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." 2 U.S. Code Cong. & Admin. News 2158 (1972).

The Committee's version of § 717 provides in part:

"(c) Within thirty days of receipt of notice given under subsection (b), the employee or applicant for employment, if aggrieved by the final disposition of his complaint, may file a civil action as provided in section 715, in which civil action the head of the executive department or agency, or the District of Columbia, as appropriate, shall be respondent.

(d) The provisions of section 715 shall govern civil actions brought hereunder.

(e) All functions of the Civil Service Commission which the Director of the Bureau of the Budget determines relate to nondiscrimination in government employment are transferred to the Equal Employment Opportunity Commission." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 56-57 (1971).

S. 2515, a bill addressed to the same issues. The Senate Report accompanying that bill, while recognizing that progress had been less than satisfactory, was more sanguine about what might be expected from the Civil Service Commission, and proposed to continue the antidiscrimination responsibility vested in the Commission by Executive Order 11478.[23] Despite their differences, however, the Senate Committee on Labor and Public Welfare, and the House Committee on Education and Labor were of like mind about the need for making a civil remedy in the courts available to federal employees who were dissatisfied with administrative review of their claims.[24] The provisions of § 717

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[23] "The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which may result in a lack of true equal employment opportunity. Yet, the Committee was persuaded that the Civil Service Commission is sincere in its dedication to the principles of equal employment opportunity enunciated in Executive Order 11478 and that the Commission has the will and desire to overcome any such conflict of interest. In order to assist the Commission in accomplishing its goals and to make clear the Congressional expectation that the Commission will take those further steps which are necessary in order to satisfy the goals of Executive Order 11478, the Committee adopted in Section 707(b) of the bill specific requirements under which the Commission is to function in developing a comprehensive equal employment opportunity program." S. Rep. No. 92-415, 92d Cong., 1st Sess. 15 (1971).

[24] "The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. *Aggrieved employees or applicants will also have the full rights available*

with respect to the civil remedy as adopted in the final House and Senate versions are set forth in the margin.[25]

In contrast to the conciliation provisions of the 1964 private civil remedy in Title VII, the House version would have permitted suits in the district court within thirty days of notice of an agency's disposition of claim. Because the House bill would thus have completely by-passed the appeal remedy before the Civil Service Commission's Board of Appeals and Review,[26] the civil remedy in the district court, of necessity, was the same trial *de novo* as in a private employment discrimination case. However, because the Senate Committee proposed to preserve the anti-

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in the courts as are granted to individuals in the private sector under title VII." Id. at 16 (emphasis supplied).

[25] See note 22 *supra* for the final House version which is identical to its committee's version. 117 Cong. Rec. (1971). The final Senate version provided:

"'(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

'(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.'" 118 Cong. Rec. 4948 (1972).

[26] See note 22 *supra*.

discrimination enforcement authority of the Civil Service Commission, the Senate's version of § 717(c) made reference to the appeal remedy available before the Commission.[27] The Senate Committee report explains what was intended to be accomplished:

> "The bill (section 717(c)) enables the aggrieved Federal employee (or applicant for employment) to file an action in the appropriate U.S. district court after either a final order by his agency or a final order of the Civil Service Commission or an appeal from an agency decision or order in any personnel action in which the issue of discrimination on the basis of race, color, religion, sex or national origin has been raised by the aggrieved person. *It is intended that the employee have the option to go to the appropriate district court* or the District Court for the District of Columbia *after either the final decision within his agency* on his appeal from the personnel action complained of *or after an appropriate appeal to the Civil Service Commission or after the elapse of 180 days* from the filing of the initial complaint or appeal with the Civil Service Commission." (emphasis supplied) [28]

Thus in order to meet the substantial objections to the Civil Service Commission remedy, the Senate proposed to give public sector litigants the *option* of bypassing the Commission and seeking a judicial remedy at the outset. At the same time, those federal employees who had confidence in the Commission could appeal to it, but they would not thereby lose their right to an action in the district court if the Commission's decision was unsatisfactory.

The Conference Committee adopted the Senate's approach,[29] and § 717(c) as enacted, is identical in language

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[27] See note 25 *supra*.

[28] S. Rep. No. 92-415, 92d Cong., 1st Sess. 16 (1971).

[29] The Conference Report is not enlightening. It states:

"The Senate amendment provided that all personnel ac-

to S. 2515 to which the Senate Report, quoted above, refers. The Senate Report would appear, then, to be the authoritative expression of Congressional intent. As will be developed hereafter, the option as to remedies which § 717(c) plainly affords, significantly bears upon the scope of review issues considered by the district court.

Retroactivity of § 717

Because the acts of discrimination complained of by Sperling took place before March 24, 1972, the effective date of the 1972 amendments, the government disputes the applicability of § 717 to this case. Sperling contends that because the statute is procedural and remedial in nature, it should be given retroactive application. Thus, since the administrative proceeding in his case was still pending on the effective date of the amendments, and was not concluded until July 15, 1972, Sperling urges that he is entitled to the civil remedy that § 717(c) affords. The question of the retroactivity of § 717 has already generated extensive liti-

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tions involving Federal employees be free from discrimination. This policy was to be enforced by the United States Civil Service Commission. Each agency of the Federal Government would be responsible for establishing an internal grievance procedure and programs to train personnel so as to enable them to advance under the supervision of the Civil Service Commission. If final action had been taken by an agency or the Civil Service Commission, an aggrieved party could bring a civil action under the provisions of section 706. The House bill did not cover Federal employees. The House receded. In providing the statutory basis for such appeal or court access, it is not the intent of the Committee to subordinate any discretionary authority or final judgment now reposed in agency heads by, or under statute for national security reasons in the interests of the United States." S. Rep. No. 92-681, 92d Cong. 2d Sess. (1972), reprinted in 2 U.S. Code & Cong. Admin. News 2185 (1972).

This discussion actually misstates the thrust of the House bill. It confirms however, that the Senate version of § 717(c) was adopted. The Conference Report's version of § 717(c) is identical with that of the Act's. See S. Rep. No. 92-681, 92d Cong., 2d Sess. 11 (1972).

gation. The Second,[30] Fourth [31] and District of Columbia [32] Circuits have given the Act retroactive application. The Sixth Circuit, reasoning that waivers of sovereign immunity should be strictly construed, has held that it should have prospective application only.[33] However, long before the enactment of § 717, the Third Circuit had concluded that other jurisdictional grants waived the federal government's sovereign immunity as a bar to the review of federal employment decisions.[34] A back pay award was available against the federal government before the enactment of § 717. See Back Pay Act of 1966, 5 U.S.C. § 5596. That statute as well as several of its predecessors which were to like effect have been held to apply retroactively.[35]

We do not find the Sixth Circuit's sovereign immunity rationale for prospective application of § 717 persuasive in light of the longstanding waiver of immunity in the federal employment context. Whatever little may be said in support of a rule of strict construction of waivers of sovereign immunity in new fields, nothing can be said in favor of strict construction of a waiver in a field where it has

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[30] Brown v. Gen. Servs. Admin., 8 F.E.P. Cas. 1299 (2d Cir. 1974), *pet. for cert. filed*, 43 U.S.L.W. 3430 (U.S. Dec. 20, 1974) [References to "F.E.P. Cas." where cited, are to the Bureau of National Affairs' Fair Employment Practices Service].

[31] Koger v. Ball, 497 F.2d 702 (4th Cir. 1974).

[32] Womack v. Lynn, 8 F.E.P. Cas. 844 (D.C. Cir. 1974).

[33] Place v. Weinberger, 497 F.2d 412 (6th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3306 (U.S. Nov. 25, 1974).

[34] *Compare* Chaudoin v. Atkinson, 494 F.2d 1323 (3d Cir. 1974); Iannarelli v. Morton, 463 F.2d 179 (3d Cir. 1972); Rosenman v. Levbarg, 435 F.2d 1286 (3d Cir. 1970); DeLong v. Hampton, 422 F.2d 21 (3d Cir. 1970); Charlton v. United States, 412 F.2d 390 (3d Cir. 1969), *with* Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965).

[35] Koger v. Ball, 497 F.2d 702, 705 (4th Cir. 1974).

long existed. No other reason has been suggested for a prospective application of § 717, and we find Judge Butzner's analysis in the Fourth Circuit's decision, persuasive. He points to the legislative history of the statute, which indicates that Congress did not need to create new substantive rights for federal employees when it enacted § 717. Rather, Judge Butzner reasons that this provision was designed only to make judicial enforcement of longstanding federal substantive policies against employment discrimination more certain and more effective than in the past. Section 717, he concludes, is a classic example of a procedural or remedial statute applicable to cases pending at the time of enactment.[36] We agree with Judge Butzner and with those circuits which have held that § 717 applies to actions where an administrative claim was pending at the time of its enactment. Literally the statute applies to the case *sub judice*, since Sperling's suit was filed within thirty days of his receipt of notice of the Commission's action. Being procedural and remedial in nature, the Act governs the claims disposed of by that administrative decision.[37]

Scope of Judicial Review

The district court, while expressing doubt as to the applicability of § 717, concluded in the alternative that judicial review under the Act was limited to determining whether or not administrative due process had been afforded.[38] Neither the text of the statute nor any clues which may be divined from its legislative history support such a conclusion. The proper role of the district court in a § 717 case has, like the retroactivity issue, produced

[36] *Id.* at 706.

[37] Thus the district court had jurisdiction under 42 U.S.C. § 2000e-5(f)(3) to consider Sperling's § 717 claim for relief. We need not decide whether, and to what extent, that jurisdictional grant duplicates those in 28 U.S.C. §§ 1331, 1343(4).

[38] See note 5 *supra*.

abundant litigation.[39] None of the cases recommend themselves to us as a completely satisfactory explanation of

[39] The decisions are in conflict as to whether § 717(c) requires a trial *de novo* in the district court. Those courts which have found such a remedy in the Act have tended to be located in areas where government installations are few, and where as a consequence, § 717 litigation has been light. *E.g.*, Hunt v. Schlesinger, 10 F.E.P. Cas. 52 (W.D. Tenn. 1974); Robinson v. Klassen, 9 F.E.P. Cas. 84 (E.D. Ark. 1974); Griffin v. Postal Serv., 385 U.S. 274 (M.D. Fla. 1973); Jackson v. Civ. Serv. Comm., 379 F. Supp. 589 (S.D. Texas 1973). However, a district court in the Southern District of New York, faced with a potentially large number of litiginous federal employees has also held in favor of a trial *de novo*. Henderson v. Defense Contract Admin. Servs. Region, 370 F. Supp. 180 (S.D. N.Y. 1973). In addition Judge Wollenberg writing in Thompson v. Dept. of Justice, 360 F. Supp. 255 (N.D. Cal. 1973), had originally decided that the Act required a trial *de novo*, and then reversed his position, accepting the contrary view espoused principally by the courts in the District of Columbia Circuit. Thompson v. Dept. of Justice, 372 F. Supp. 762 (N.D. Cal. 1974). *See also* McLaughlin v. Callaway, 10 F.E.P. 135 (S.D. Ala. 1974) (finding a discretionary right to a trial *de novo*).

Judge Gesell's opinion in Hackley v. Johnson, 360 F.Supp. 1247 (D.D.C. 1973), *appeal docketed*, No. 73-2072 (D.C. Cir., Sept. 7, 1973), is the leading decision rejecting a *trial de novo* in all cases brought under § 717(c). The District of Columbia of course has the highest concentration of federal employees anywhere in the nation, and Judge Gesell noted that a brief review of the civil docket of the District Court for the District of Columbia revealed no less than nineteen § 717(c) claims awaiting disposition at the time *Hackley* was decided. 360 F.Supp. at 1249 n.2.

The only circuit decision to have reached this issue agreed with Judge Gesell's position. Salone v. United States, 10 F.E.P. 1 (10th Cir. 1975). Other district court opinions which have followed his lead include Allen v. Veterans Admin, 10 F.E.P. Cas. 195 (W.D. Pa. 1974); Baca v. Butz, 376 F. Supp. 1005 (D.N.M. 1974); Cates v. Johnson, Civ. Act. No. 73-983 (W.D. Pa., July 18, 1974), *appeal docketed*, No. 74-2079 (3d Cir. 1974); Eastland v. TVA, 8 F.E.P. Cas. 1226 (N.D. Ala. 1974); Ficklin v. Sabatini, 9 F.E.P. Cas. 70 (E.D. Pa. 1974); Guilday v. Dept. of Justice, 385 F. Supp. 1096 (D.Del. 1974); Haire v. Callaway, 9 F.E.P. Cas. 168 (E.D. Mo. 1974); Handy v. Gayler, 364 F.Supp. 676 (D.Md. 1973); Johnson v. Postal Serv., 364 F.Supp. 37 (N.D. Fla. 1973), *aff'd per curiam*,

the district court's role in § 717 cases. Many proceed on the assumption that no real change in the role of the judiciary was intended. But that approach simply belies the plain language of the statute. Section 717(d) provides:

> "The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder."

Section 706(f) through (k), 42 U.S.C. § 2000e-5(f)-(k), set forth the remedies available in the district court to private litigants in non-federal employment. The Supreme Court has held that actions by private litigants under § 706 are considered *de novo* in the district court even if they follow EEOC proceedings.[40] Indeed the language of § 706 hardly admits of any other interpretation. Thus § 706(f) provides:

> "(4) It shall be the duty of the Chief Judge of the district . . . to designate a judge in such district to *hear and determine* the case.
>
> . . . .
>
> (5) It shall be the duty of the judge designated . . . . . *to assign the case for hearing* at the earliest practicable date . . . ." (emphasis supplied)

and § 706(g) provides:

> "If the court *finds* that the respondent has intentionally engaged in or is intentionally engaging in an

497 F.2d 128 (5th Cir. 1974); Pointer v. Sampson, 62 F.R.D. 689 (D.D.C. 1974); Pendleton v. Schlesinger, 8 F.E.P. 853 (D.D.C. 1974); Roberts v. Mumford, 8 F.E.P. Cas. 1195 (D.D.C. 1974); Rooney v. Saxbe, 8 F.E.P. Cas. 933 (D.D.C. 1974); Smith v. Snyder, 381 F.Supp. 1083 (E.D. Pa. 1974); Spencer v. Schlesinger, 374 F.Supp. 840 (D.D.C. 1974).

Outside of the District of Columbia, the opinions would appear to be about evenly divided on the issue.

[40] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Fekete v. U.S. Steel Corp., 424 F.2d 331 (3d Cir. 1970).

> unlawful employment practice . . . [it] may enjoin the respondent . . . ." (emphasis supplied)

Certainly nothing in § 706 suggests any role for the district court other than that of making an independent factual determination of the alleged fact of employment discrimination. There is no restrictive language such as is found in 28 U.S.C. § 2347(a) dealing with the review of final administrative agency orders, or in 5 U.S.C. § 702 *et seq.* dealing with district court review of agency adjudications. If the district court's role in § 717(c) federal employment discrimination cases is other than *de novo*, the limitation must be found elsewhere than in the remedy provisions of § 706.

Section 717 itself is the only other provision to which we have been referred that purportedly limits the district court's role. Although a number of district courts, and at least one circuit court,[41] claim to have found a limitation of the district court's § 706 jurisdiction in § 717 (or have merely assumed it) we have great difficulty with this approach. Our hesitancy in accepting that analysis is attributable to the fact that in some § 717(c) cases the trial in the district court *must* be *de novo*. Section 717(c) provides that if a discrimination charge is filed with the employing agency by a federal employee, and the agency has not made a final disposition of the complaint within 180 days, the employees may then file suit in the district court. Obviously in such a suit, one would have to make a record in the district court upon which the court could then adduce the facts concerning the claim. From this class of § 717(c) cases we move to the situation where the employing agency has already processed and rejected a discrimination claim. Here, the plain language of § 717(c) itself, as well as the Senate Report's discussion of that provision,[42] make clear

[41] Salone v. United States, 10 F.E.P. 1 (10th Cir. 1975). See note 39 *supra*, for a listing of these decisions.

[42] See text accompanying note 28 *supra*.

that the employee has the *option* of filing suit in the district court *or* appealing to the Civil Service Commission.[43] If suit has been filed the record made by the employing agency would, at a minimum, be evidentiary in the district court. In some cases summary judgment, pursuant to Rule 56 Fed. R. Civ. P., would undoubtedly be appropriate.

If the aggrieved federal employee selects the second option, appeals to the Civil Service Commission, and then seeks a private civil remedy, the only statutory reference to the district court's role is the cross-reference quoted above in § 717(d) to the provisions in § 706(f) through (k) "as applicable." Those courts which have concluded that a trial *de novo* is not available in a case where an appeal has been taken to the Commission have found room for that construction in the use of the words "as applicable."[44] It is difficult to comprehend how those words can support that construction. Such a reading would seem to imply that there are some cases where all of § 706, including even the jurisdictional grant in § 706(f)(3), might not be applicable.[45] Yet the same courts which have said that trial

[43] In Brown v. Gen. Servs. Admin., 8 F.E.P. Cas. 1299 (2d Cir. 1974), *pet. for cert. filed*, 43 U.S.L.W. 3430 (U.S. Dec. 20, 1974), the Second Circuit suggests that a federal employee must exhaust the remedy of an appeal to the Civil Service Commission's Board of Appeals and Review before being permitted to file a § 717(c) suit. Compare the several views expressed on that issue in Perm v. Schlesinger, 490 F.2d 700 (5th Cir. 1973).

We are unable to see how such an exhaustion rule can be imposed in the face of the express provisions in § 717(c), and in light of the language of the Senate Report. See text accompanying note 28 *supra*.

[44] See cases in note 39 *supra*.

[45] Section 706(f)(3), 42 U.S.C. § 2000e-5(f)(3) provides:

> "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought."

de novo is not available where an agency record has been made and appeal taken to the Commission, have assumed jurisdiction under § 706(f)(3). There is no language in § 706(f) which can be relied upon to exclude a trial *de novo* in any case. If the "as applicable" language were intended to exclude a trial *de novo* in all cases where an agency record was made, it would have to be so because the § 706 civil action remedy was somehow inapplicable, and therefore judicial review dependant upon some other remedy and statutory grant of jurisdiction.

More significantly, the inclusion of the words "as applicable" in § 717(d) could not have had any reference to the existence of a Civil Service Commission appeal procedure, since the "as applicable" language was included in the Senate bill S. 2515 long before the decision was made in the Senate Committee to amend the original version of the bill and provide for a CSC role in discrimination.[46] Neither under Title VII as enacted in 1964, nor under any version of the 1972 proposed amendments was it ever contemplated that action by the EEOC would deprive a private sector litigant of a trial *de novo*. If the words "as applicable" were not so intended when the bill was referred to the EEOC, there is no reason to conclude that they took on a new meaning when the CSC was substituted for the EEOC with respect to federal employees.[47]

[46] See notes 61 to 65 *infra* accompanying text.

[47] See notes 60 and 61 *infra* and accompanying text. By way of

With the exception of the first class of § 717(c) cases discussed above, in which a federal employing agency failed to act on a complaint for 180 days and thereby necessitated judicial fact-finding in a *de novo* proceeding in the district court, a construction limiting the district court's role to review of the administrative record would leave the law concerning the judicial review of federal agency employment decisions exactly where it was before a § 717 was enacted, at least in circuits such as ours, which did not recognize a sovereign immunity bar to judicial review.[48] In the other actions referrable to the district court pursuant to § 717(c) there would be at least a record of fact-finding made by the employing agency, and in the situation where an appeal was taken to the CSC, the record made by the Board of Appeal and Review as well. It takes we think, a strained reading of § 717(c) to suggest that in three of the four situations in which a suit is explicitly permitted, Congress intended no advance beyond the existing law.

The leading case limiting aggrieved public employees to district court review based on the administrative record in a § 717(c) suit, rather than granting a trial *de novo* is Judge Gesell's decision in *Hackley* v. *Johnson*.[49] This

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contrast, the House version as reported out of committee included no words of limitation in § 717(d). See note 22 *supra*.

The Conference Report states:

> "The provisions of sections 706(f) through (k), concerning private civil actions by aggrieved persons, are made applicable to aggrieved Federal employees or applicants for employment. . . ." Conference Report, S.Rep. No. 92-681, 92d Cong., 2d Sess. (1972), reprinted in Senate Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1851 (Comm. Print 1972).

[48] See cases in note 34 *supra*. In circuits such as the Eighth, which barred judicial review on sovereign immunity grounds, it could be argued that § 717(c) was a waiver which permitted conventional review pursuant to other statutes in cases where § 717 was not applicable.

[49] 360 F.Supp. 1247 (D.D.C. 1973), *appeal docketed*, No. 73-2072

opinion, oft-quoted as a result of the concentration of § 717(c) litigation in the District of Columbia Circuit, concludes that it was not the congressional intent to provide a *de novo* trial in all such proceedings.[50] In so holding, *Hackley* misreads the Act's legislative history.

The House was the first branch of Congress to move on its version of the Act. On June 21, 1971, H.R. 1746, a bill entitled the "Equal Employment Opportunities Enforcement Act of 1971" was reported out of the House Committee on Education and Labor without amendment and with a recommendation for its passage.[51] As we have already noted, the House Report was highly critical of the Civil Service Commission's performance in eliminating discrimination in federal employment, and sought to correct this deficiency by transferring its enforcement functions to the EEOC.[52] And as already noted, the bill extended Title VII for the first time to federal employees by providing for a private civil remedy in the district courts.[53] However,

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(D.C. Cir., Sept. 7, 1973). See discussion of case law in note 39 *supra*.

[50] 360 F.Supp. at 1250-52.

[51] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 1 (1971). The House Committee's Report is reprinted in 2 U.S. Code Cong. & Admin. News 2137 (1972).

[52] The House Committee's version of § 717(b) provided:

> "The Equal Employment Opportunity Commission shall have authority to enforce the provision of subsection (a) and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities hereunder, and the head of each executive department and agency and the appropriate officers of the District of Columbia shall comply with such rules, regulations, orders, and instructions; Provided, That such rules and regulations shall provide that an employee or applicant for employment shall be notified of any final action taken on any complaint filed by him thereunder."
>
> H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 56 (1971).

[53] See note 22 *supra*.

the principal feature of H.R. 1746 was its provision for a judicially enforceable cease and desist authority to be vested in the EEOC.[54] It was this latter provision which sparked the most controversy when the bill was brought to the House floor for debate on September 15, 1971.

Opponents of the committee bill argued that the EEOC's cease and desist authority denied due process safeguards to private employers. They urged instead House passage of H.R. 9247 as an amendment in the nature of a substitute to H.R. 1746.[55] The "Erlenborn substitute," as it was called, proposed transferring enforcement powers to the courts rather than vesting the EEOC with a cease and desist power.[56] Following a second day of debate on Septem-

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[54] The House Committee's version of § 706(h) provided in part:

> "If the Commission finds that the respondent has engaged in an unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons aggrieved by such unlawful employment practice an order requiring the respondent to cease and desist from such unlawful employment practice and to take such affirmative action, including reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), as will effectuate the policies of this title . . . ."

117 Cong. Rec. 31982 (1971).

[55] The first day of debate of the bill on the floor of the House including the discussion of the "Erlenborn substitute" is found in 117 Cong. Rec. 31958-85 (1971).

[56] The "Erlenborn substitute" version of § 706(h) provided in part:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or

ber 16, 1971, the House voted 202-197 to consider H.R. 1746 as amended by the Erlenborn substitute,[57] and finally passed the bill in that amended form by a vote of 285 to 108.[58]

Two days earlier, the Senate version of the bill, S. 2515, was introduced on the floor of the Senate in behalf of its cosponsors, Senators Williams of New Jersey and Kennedy of Massachusetts, and then referred to the Senate's Committee on Labor and Public Welfare for study.[59] Like the original version of the House bill, S. 2515 sought to provide the EEOC with a method of enforcing the rights of private sector employees who had been subjcted to unlawful employment practices. And like the House's Committee bill, the key feature of the Senate version was a cease and desist authority vested in the EEOC.[60] The bill, as referred to committee, extended Title VII coverage to federal employees with enforcement authority in the EEOC, and provided for a private civil action in the district courts for aggrieved employees.[61]

> labor organization, as the case may be, responsible for the unlawful employment practice)."

117 Cong. Rec. 31980 (1971).

[57] *Id.* at 32111-12.

[58] *Id.* at 32113.

[59] *Id.* at 31711.

[60] The original version of § 717(h) as referred to the Senate Committee provided in part:

> "If the Commission finds that the respondent has engaged in an unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons aggrieved by such unlawful employment practice an order requiring the respondent to cease and desist from such unlawful practice and to take such affirmative action, including reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organizations, as the case may be, responsible for the unlawful employment practice), as will effectuate the policies of this title . . . ."

117 Cong. Rec. 31712 (1971).

[61] 117 Cong. Rec. 31715 (1971). Section 717(b)-(d) as referred

On October 28, 1971 the Senate Committee on Labor and Public Welfare reported out S. 2515 favorably, and recommended its passage subject to an amendment which extensively altered the § 717 proposal.[62] At the time the bill had been originally introduced to the Senate, Senator Kennedy as one of its cosponsors, had expressed concern over the bill's transfer of all equal employment opportunity functions from the Civil Service Commission to the EEOC. He opposed the transfer on two grounds: that the EEOC was already overworked in processing private sector claims, and that it was unwise to place the nation's entire equal

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to the Senate Committee provides:

> "(b) The Equal Employment Opportunity Commission shall have authority to enforce the provision of subsection (a) and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities hereunder, and the head of each executive department and agency and the appropriate officers of the District of Columbia shall comply with such rules, regulations, orders, and instructions: *Provided*, That such rules and regulations shall provide that an employee or applicant for employment shall be notified of any final action on any complaint filed by him thereunder.
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> (c) Within thirty days of receipt of notice, given pursuant to subsection (b), of final action taken on a complaint of discrimination based on race, color, religion, sex, or national origin, or after ninety days from the filing of the initial charge until such time as final action may be taken, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706(q), in which civil action the head of the executive department or agency, or the District of Columbia, as appropriate, shall be the respondent.
>
> (d) The provisions of section 706(q) through (w), as applicable, shall govern civil actions brought hereunder."

117 Cong. Rec. 31715 (1971).

[62] S. Rep. No. 92-415, 92d Cong., 1st Sess. 1 (1971).

opportunity effort in a single agency's hands.[63] As a result, an amended version of § 717 was added in committee at the behest of the bipartisan efforts of Senator Kennedy and Senators Cranston of California and Dominick of Colorado.[64] Both the Report, as it relates to a continuing Civil Service Commission role, and the Senate committee version of § 717(c), have already been set out in the margin.[65] Because the Senate was preoccupied with other pressing legislative matters, however, debate on the floor was delayed until the new year.

On January 18, 1972, the Senate Committee's version of S. 2515 was brought to the floor. It will be recalled that the House had already voted against a cease and desist authority in the EEOC in approving their version of the bill.[66] The Senate after four weeks of lengthy debate, followed suit and adopted the so-called "Dominick amendment" which also substituted EEOC enforcement through the courts.[67] However, opponents of the bill, led by Senator Allen of Alabama, continued to filibuster against its passage, even after the Senate's approval of the Dominick amendment.[68] On February 22, 1972, following two unsuccessful attempts at cloture, two-thirds of the Senate voted to limit further debate.[69] Before finally voting on S. 2515, the bill's sponsors attempted to provide their colleagues with an analysis of its salient features. It is at

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[63] 117 Cong. Rec. 31718 (1971).

[64] 118 Cong. Rec. 4921 (1972) (Remarks of Senator Cranston).

[65] See notes 23 and 25 *supra*. The final Senate version as quoted in note 25 *supra* is identical to the amended version reported out by the Senate Committee. *Compare* S. Rep. No. 92-415, 92d Cong., 1st Sess. 72 (1971), *with* 118 Cong. Rec. 4948 (1972).

[66] See text accompanying notes 55-58 *supra*.

[67] 118 Cong. Rec. 4907 (1972).

[68] *Id.* at 4907-08 (Remarks of Senators Allen and Williams).

[69] *Id.* at 4911-12.

this point, that the legislative history presents some difficulties.

Senator Williams, one of the bill's original sponsors, and its manager on the floor provided a summary of § 717(c):

> "Finally, written expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for a review of the administrative proceeding record after a final order by his agency or by the Civil Service Commission, if he is dissatisfied with that decision. Previously, there have been unrealistically high barriers which prevented or discouraged a Federal employee from taking a case to court. This will no longer be the case. There is no reason why a Federal employee should not have the same private right of action enjoyed by individuals in the private sector, and I believe that the committee has acted wisely in this regard."[70]

In support of his statement, Senator Williams had a more lengthy analysis printed in the *Record*. This analysis was taken almost verbatim from the Senate Committee Report. There were however, some alterations of language which are significant for our purposes. We have set out the Williams analysis side-by-side with the Committee analysis in the margin to indicate these alterations, placing in brackets, and italicizing that wording in the Williams analysis which differs from the Committee's version.[71] It would appear that the subtle change in nuance, quite clearly reflected in Senator Williams' alterations, was intended to emphasize the view that § 717(c) was to provide for only administrative review in the district court. Although deference is due to the Williams analysis in view of his role as cosponsor and floor manager of the bill, we believe the analysis in the Senate Report representing the consensus of the committee charged with studying the bill, more accurately reflects the congressional intent.

That the Senate Report should be regarded as explicative of congressional intent rather than the Williams view, is further demonstrated by Senator Cranston's insertion into the *Record* of the Committee Report's discussion which we

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[70] *Id.* at 4922.

[71]

Williams Analysis

"An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action [*of review of the agency proceedings*] in the courts by Federal employees who are not satisfied with the Agency or Commission decision.

The testimony of the Civil Service Commission notwithstanding, the Committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the Committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. [*Aggrieved employees or applicants will also have the full rights of review available in the courts.*]"

118 Cong. Rec. 4923 (1972).

Senate Committee Report

"An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision.

The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII."

S. Rep. No. 92-415, 92d Cong., 1st Sess. 16-17 (1971).

have already quoted in the margin alongside the Williams analysis.[72] Senator Cranston, it will be recalled, had been

[72] 118 Cong. Rec. 4938 (1972). Senator Cranston's position has been less than unequivocal. Judge Gesell, referring to Cranston's remarks as reported in the daily edition of the *Congressional Record* concluded that Cranston had taken a similar position to Williams. 360 F.Supp. at 1252 n.7. However, this conclusion is somewhat misleading. Following Senator Williams' remarks, and before inserting the Committee Report's discussion into the *Record,* 118 Cong. Rec. 4938 (1972), Cranston purportedly made the following remarks concerning the operation of § 717(c):

> "For the first time, [it will] permit Federal employees to sue the Federal Government in discrimination cases—under the theory of Federal sovereign immunity, courts had not generally allowed such suits—and to bring suit either prior to or after CSC review of the agency EEO decision in the case. As with other cases brought under title VII of the Civil Rights Act of 1964, Federal district court review *would be based* on the agency and/or CSC record and would *not be a trial de novo.*" (emphasis supplied).

It was this version of Senator Cranston's remarks which Judge Gesell referred to in *Hackley,* and which was printed in the daily edition of the *Record,* 118 Cong. Rec. S2287 (daily ed. Feb. 22, 1972), and later reprinted in the Senate's compilation of the Act's legislative history. Senate Comm. on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. 1744 (Comm. Print 1972).

Almost a year later, and some ten months after passage of the Act, Senator Cranston corrected what he described as an "error" and an "incorrect version" of the statement in the above quote.

> "Unfortunately, Mr. President, the word 'not' was misplaced in the last sentence of the material I just quoted. I have called this to the attention of the appropriate officers, and the bound volume of the CONGRESSIONAL RECORD, which I understand will not be available for almost a year, will set forth this sentence in the correct manner as follows:
>
> > As with other cases brought under title VII of the Civil Rights Act of 1964, Federal district court review *would not be based* on the agency and/or CSC record and *would be a trial de novo.* [emphasis supplied]
>
> I hope that this correction will set the RECORD straight and that my calling attention to it today will avoid any misplaced reliance on the incorrect version as originally printed in the CONGRESSIONAL RECORD of February 22, 1972."

119 Cong. Rec. S1219 (daily ed. Jan. 23, 1973).

This corrected version of the statement indicating a right to a trial *de novo* appears in the final bound volume of the *Record,* 118 Cong. Rec. 4929 (1972), in its appropriate place in the final Senate debate on February 23, 1972. Reference to the correction, however, is not made either at this point in the bound volume, nor is Cranston's statement of correction even included on the corresponding page in the bound volume a year later. See 119 Cong. Rec. 2016 (1973).

Because of the anamolous nature of Senator Cranston's remarks we do not emphasize their importance or place reliance upon them in interpreting the Act's legislative history. However, Cranston's statement as corrected is at least internally consistent with the position set forth in the Senate Committee Report which he had placed in the *Record,* and to that extent cannot be read as supportive of the Williams view. Neither the Williams, nor the Cranston statements can be given the same weight as the Committee Report.

instrumental in amending § 717 while S. 2515 was in committee, and it was the committee's amendment of § 717 which was the version debated on the floor of the Senate. Following the conclusion of debate, the Senate passed the bill by a vote of 73 to 16.[73]

Our reading of the legislative history leads us to the conclusion that it was Congress' intent to provide an ag-

[73] *Id.* at 4944. Following the Senate's passage of S. 2515, the bill went to a conference committee to resolve differences with the House bill, H.R. 1746. After amendment by the conference committee, the final version, which made no changes in § 717 from the final Senate proposal, was reported out to both houses for final passage. Because the House had passed H.R. 1746 before the Senate had acted on its own bill, it was the House bill as amended which was transmitted to Congress for approval. The Senate approved the bill on March 6, 1972, followed by the House on March 8, 1972. The Conference Report is found in S. Rep. No. 92-681, 92d Cong., 2d Sess. (1972), and is reprinted in part in 2 U.S. Code Cong. & Admin. News 2179 (1972).

On March 24, 1972 the Equal Employment Opportunity Act of 1972 took effect.

grieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant. Judge Gesell's reliance in *Hackley* on Senator Williams' statement and analysis of the bill was misplaced; and his conclusion that a trial *de novo* is not mandated was erroneous.[74] We hold therefore that the statutory language of the Act, as well as its legislative history, indicates a right to a trial *de novo* in the district court when suit is brought by an aggrieved federal employee pursuant to § 717(c).

The Plaintiff's Burden

Having concluded that there is no statutory warrant for assigning the district court a different role in a § 717 case on the basis of either the absence or presence of an agency record, and also having concluded that the Act mandates a trial *de novo* in all cases, we next consider the function of the agency record in the district court proceeding. As we have discussed earlier, in most instances a discrimination complaint will have already been the subject of agency review before the aggrieved employee brings suit under § 717(c). In the district court proceeding, as in any civil action, the employee has the burden of proving his allegations of agency discrimination. In this regard the agency record will have evidentiary value. It may well establish that there is no genuine fact issue as to the absence of discrimination. In such a case summary judgment is appropriate. If, however, there is a genuine fact issue, that must be resolved by the district court pursuant to the Federal Rules of Civil Procedure. However, the Federal Rules do not specifically instruct the district court as to

[74] For an analysis of Judge Gesell's opinion see, Comment, *Hackley v. Johnson*: The Federal Employee's Right to Trial De Novo Review of Civil Service Discrimination Determinations, 123 U. Pa. L. Rev. 206 (1974). The author concludes that "a close analysis of the language [of 717(c)] suggests that a trial de novo was intended." *Id.* at 208.

the proper standard of review to be applied to the agency's fact-finding record, nor does the language of § 717(c) itself enlighten us in this regard.

Among those decisions which have considered the appropriate standard of judicial review under § 717(c), the two opinions which most thoughtfully address the problem in the context of an agency record which has rejected a discrimination claim, are those of Judge Gesell in *Hackley* v. *Johnson*,[75] and Judge Caleb Wright in *Guilday* v. *Department of Justice*.[76] Both opinions reject the position that § 717(c) represented no advance beyond the previously existing law. Both reject the contention that the judicial role is limited to "substantial evidence" review in those cases where an agency record exists.[77] They reject, *a fortiori*, the position of the district court in this case that judicial review in a § 717 case is narrower still, being an inquiry limited solely to a consideration of administrative due process.

In *Hackley*, Judge Gesell declined to accept the plaintiff's position that in every § 717(c) case a district court evidentiary hearing was required, and dismissed as well the government's position that the district court was limited to substantial evidence review.

> "The district court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the *clear weight of the evidence* in the record, *no new trial* is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." (emphasis supplied).[78]

[75] 360 F. Supp. 1247 (D.D.C. 1973).

[76] 385 F. Supp. 1096 (D.Del. 1974).

[77] 360 F. Supp. at 1252-53; 385 F. Supp. at 1099-1102.

[78] 360 F.Supp. at 1252.

Judge Gesell's approach requires that the district court examine the administrative record and determine if on that record, by the clear weight of the evidence,[79] the government is entitled to a judgment. If not, he suggests, the district court may in its discretion either remand or take further testimony. The more attractive course to hard-pressed district court judges seems obvious.

But remand to whom? If a § 717(c) suit is commenced after an adverse employing agency decision, one would suppose that the remand would properly be to the employing agency. If the suit is commenced after a decision by the Civil Service Commission's Board of Appeals and Review,[80] a remand to it would require a second remand by the Board to the employing agency for the purpose of further fact finding. Entirely aside from the absence of any statutory authority for a district court to direct either a single or a double remand to an executive department agency for the purpose of taking testimony,[81] there is the underlying issue of credibility. The motivational criteria that may color agency decisions on employment or promotion cannot, even in the computer age, be quantified, and motivation is what § 717 is all about. A remand for a decision on motivation, which shields the ultimate trier of fact from a face to face confrontation with those witnesses who were exposed to the events, does not seem consistent with the rather clear policy decision implicit in the enactment of § 717. That

[79] The classic trichotomy is proof beyond a reasonable doubt, clear and convincing proof, or proof by a preponderance of the evidence. It is unclear where the "clear weight" test lies between the reasonable doubt and the preponderance of evidence standards, or whether in fact, it makes any difference.

[80] § 717(c); 5 C.F.R. § 713.231 *et seq.*

[81] Compare with the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Remand from the district court to the administrative agency is permitted under 5 U.S.C. § 706.

policy decision, it seems to us, was that the executive branch agencies would no longer be the judges of their own motivation.

Judge Wright's opinion in *Guilday* v. *Department of Justice*, also rejects both the plaintiff's position that trial *de novo* is always available, and the government's position that the court's role is limited to substantial evidence review.[82] While relying on *Hackley*, Judge Wright also found authority in Rule 56(c), Fed. R. Civ. P. for rejecting plaintiff's claim to an evidentiary hearing:

> "As a matter of course, the Government—and often the plaintiff—moves for summary judgment based on the administrative record. The court must decide, after reviewing the record, whether there is a genuine issue as to any material fact and whether that movant is entitled to a judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. Based on this review, the Court either remands for further administrative proceedings, allows the case to go to trial—with the administrative record in evidence—, or grants or denies relief on the administrative record." (footnote omitted)[83]

Judge Wright then proceeded to consider by what standard a district court should review the administrative record, and held that it would require that the "absence of discrimination be established by the preponderance of evidence in the administrative record."[84]

There is no doubt that in appropriate cases summary judgment may be correct. But we do not think that Rule 56(c) can support the kind of hybrid judicial review envisaged by Judge Wright. Our difficulty lies in applying

[82] 385 F. Supp. at 1099-1102.

[83] *Id.* at 1099. See the concluding paragraph of this section, p. 79a *infra.*

[84] *Id.* at 1102.

his proposed standard of review. Consider, hypothetically, a discrimination complaint which turns on credibility. If the agency's hearing examiner makes credibility judgments against the complaining employee, will the district court then defer to those judgments or instead attempt to reach an independent judgment on the basis of a transcript without ever having the benefit of an opportunity to observ the demeanor of the complainant and other witnesses? If the Board of Appeals and Review of the Civil Service Commission, which also reviews on the agency record, has affirmed the hearing examiner's decision, what deference will be given to the Board's decision by the district court in applying the preponderance test? Finally, since in the administrative grievance proceedings the burden presumably is on the employee to establish his grievance,[85] what justification is there, when the matter reaches court, for reviewing the record to see if the government has disproved the grievance by a preponderance of the evidence?

We are well aware that a substantial motivation of those courts which have held that federal employee discrimination claims will be reviewed on the agency record by a substantial evidence standard has been their perception of the deluvian consequences of such lawsuits in the federal judicial system, and of the waste involved in affording both administrative and judicial remedies. Those concerns, while real, are matters properly within the sphere of the legislature. In any event, the federal courts have not been put out of business by Title VII lawsuits from the private sector. Those suits, too, in many cases duplicate grievance-arbitration remedies analogous to the grievance remedies established by federal regulation for government employees. Though the burden imposed on the federal courts by § 717 will be a heavy one, we will, one suspects, remain open for business.

[85] In *Hackley* v. *Johnson, supra,* Judge Gesell appears to have taken the view that a complainant satisfies his or her burden of going forward by introducing any proof suggestive of discrimination.

> "Those who feel aggrieved, once having brought forward any proof suggestive of discrimination, are entitled to require those most cognizable of the relevant employment practices to come forward and disprove the accusation by the clear weight of the evidence."
>
> 360 F. Supp. at 1253.

We believe this view to be incorrect. The burden is on the federal employee to prove his or her discrimination claim by a preponderance of the evidence.

We thus conclude that in the *de novo* proceedings in the district court, the agency record can be reviewed on a motion for sumary judgment by the standard generally applicable under Rule 56, Fed. R. Civ. P.; that is the existence of any genuine issue of fact as to employment discrimination. If such a motion is not granted, the agency record is admissible in evidence at trial when appropriate under the applicable Federal Rules of Civil Procedure and of Evidence. And, as in any other civil action, the aggrieved federal employee must prove his or her discrimination claim by a preponderance of the evidence.

Sperling's Case

Although the district court applied an improper legal standard in deciding the government's motion for summary judgment, a remand by this court would not be necessary if by any standard Sperling could not prevail. Thus we must consider whether § 717 is applicable to Sperling's charge that the government discriminated against him as a consequence of his representation of blacks in grievance discrimination proceedings at Fort Monmouth. The government, without referring us to any authority, but instead relying on the language in § 717(a) that prohibits "discrimination based on race, color, religion, sex, or national origin" in federal employment, argues that the 1972 Act afforded no substantive protection

from reprisal or retaliation to Sperling in his capacity as a *representative* of a black employee claiming discrimination. However, almost identical language appears in 5 U.S.C. § 7151 *et seq.*, which seeks to insure equal employment opportunities to federal employees.[86] Acting pursuant to those provisions, the Civil Service Commission has adopted regulations which provide in pertinent part:

> "Complainants, their *representatives*, and witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal at any state in the presentation and processing of a complaint, including the counseling stage under section 713, or anytime thereafter." (emphasis supplied).[87]

This is a construction of § 7151 *et seq.* by the very agency charged with its administration. The § 717(c) remedy supplements those additional remedies which were made available to federal employees pursuant to 5 U.S.C. § 7151 *et seq.*, and it would be quite illogical to assume a congressional intention that § 717 be read more narrowly. We conclude, therefore, that Sperling's claim of discrimination falls within § 717's ambit.

The government also contends that on the administrative record in this case, which is the only evidence on which Sperling relied, the defendants are entitled under Rule 56 to a summary judgment that he was not discriminated against. We have reviewed the entire record, encompassing six volumes of appendix, and conclude that summary judgment would be inappropriate here because genu-

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[86] 5 U.S.C. § 7151 provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, or national origin. The President shall use his existing authority to carry out this policy."

The President implemented this policy with his issuance of Executive Order 11478.

[87] 5 C.F.R. § 713.261(a).

ine issues of fact exist as to Sperling's allegations of employment discrimination.

On remand the district court must make an independent determination as to whether the charge of discrimination which was pending at the time of enactment of § 717 has been sustained by a preponderance of the evidence. In making that determination the court will have to consider to what extent evidence relating to prior acts of alleged discrimination are properly considered as evidentiary in support of the pending charge. For example, Sperling traces his ongoing employment difficulties to a highly critical report written by William Biven, an Assistant Deputy Equal Employment Opportunity Officer at Fort Monmouth, with respect to his conduct as the representative of a black complainant in a June, 1967 discrimination hearing. (3 Appendix at 915-40). The report urges that Sperling be disciplined for what Biven characterized as Sperling's "misconduct" as the complainant's representative at the hearing (3 Appendix at 929-36). Whether there is in fact any connection between the Biven report and subsequent decisions on Sperling's promotion is a matter which the district court must consider. Since we are remanding so that it can make an independent factual determination, it is not appropriate for us to express our views on the facts except to hold that summary judgment was improper here.

Finally, as to the request for attorneys fees, such an award may be made only if Sperling prevails below. 42 U.S.C. § 2000e-5(k).

The order of the district court granting summary judgment for the defendants will be reversed and the case remanded for further proceedings consistent with this opinion.

To THE CLERK OF THE COURT

Please file the foregoing opinion.

Circuit Judge

OPINION OF THE TENTH CIRCUIT IN SALONE v UNITED STATES

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

No. 74-1475

ANTHONY M. SALONE, JR., *Appellant,*

v.

UNITED STATES OF AMERICA ET AL., *Appellees*

February 21, 1975

Robert B. Smith, of Miskovsky, Sullivan & Miskovsky, Oklahoma City, Okl., for appellant.

Wiliam R. Burkett, U.S. Atty., and John E. Green, Asst. U.S. Atty., for appellees.

Before LEWIS, *Chief Judge,* and SETH and MCWILLIAMS, *Circuit Judges.*

SETH, *Circuit Judge.*

Appelant Salone is a civilian employee at the Oklahoma City Air Material Area (OCAMA), Tinker Air Force Base, Oklahoma. In April 1972, Salone complained to the Commander of the Tinker AFB that his supervisors were discriminating against him because of his race, and in reprisal for a discrimination complaint filed by him some five years previously. This complaint was referred to the agency's Chief EEO Counselor who interviewed Salone and the witneses and made recommendations. Further complaints, hearings, and recommendations followed, and in March 1973 Salone was notified by the Director of Equal Employment Opportunity, Office of the Secretary of the Air Force, that his allegations of racial discrimination were not supported by the record. The decision of the Director

was affirmed without comment by the Civil Service Commission Board of Appeals and Review.

Having exhausted his administrative remedies through the Civil Service machinery, Salone filed this action in the District Court pursuant to 42 U.S.C. §§ 2000e—16 and 2000e—5. He requested a trial de novo on his allegations of discrimination, rather than a review of the administrative record. Defendant filed a motion for sumary judgment and asking that the action be dismissed for lack of subject matter jurisdiction.

The trial judge found that review of the administrative record was the procedure required, and that the record showed an absence of discrimination. He then granted the motion for summary judgment, and further found an absence of subject matter jurisdiction.

The only issue presented on this appeal is whether a federal employee filing a civil action under 42 U.S.C. § 2000e—16 is entitled to a trial de novo or judicial review of the administrative record. The statute is silent on this question. 42 U.S.C. § 2000e—16(c) provides that a federal employee who has a complaint of discrimination based on race, color, religion, or sex may, within certain time limits, "file a civil action as provided in section 2000e—5 of this title." Section 2000e—5 governs civil actions by private employees. 42 U.S.C § 2000e—16(d) reads: "The provisions of section 2000e—5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

There is no dispute that a private employee filing an action pursuant to 42 U.S.C. §§ 2000e—5(f) through (k) is entitled to a trial de novo. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. Two early cases applied this holding to actions under 42 U.S.C. § 2000e—16(c) and concluded that the 1972 amendment to the Equal Employment Opportunity Act was intended

to extend to federal employees the same procedure that was available to private employees, and thus a federal employee should be entitled to a trial de novo rather than judicial review of the administrative record. Henderson v. Defense Contract Administration Services Region, New York, 370 F.Supp. 180 (S.D. N.Y.); Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, 360 F.Supp. 255 (N.D. Cal.).

A separate line of cases also developed which maintained a distinction between private and federal employees. These cases relied on decisions concerning discharge of federal employees. In such actions, brought under 5 U.S.C. § 701 et seq., a federal employee is entitled only to review by the federal district court of the administrative record. Trials de novo are not provided. Polcover v. Secretary of Treasury, 477 F.2d 1223 (D.C. Cir.), cert. denied, 414 U.S. 1001, 94 S.Ct. 356, 38 L.Ed.2d 237; Rosenman v. Levbarg, 435 F.2d 1286 (3d Cir.); Dabney v. Freeman, 358 F.2d 533 (D.C.Cir.); Gordon v. Bright, 306 F. Supp. 252 (W.D. Okla.), aff'd 419 F.2d 835, cert. denied, 397 U.S. 1057, 90 S.Ct. 1403, 25 L.Ed.2d 674.

In Hackley v. Johnson, 360 F.Supp. 1247 (D.D.C.), the court considered the question whether a federal employee is entitled to a trial de novo after being unsuccessful in administrative agency proceedings on a complaint of employment discrimination. The court considered the history of the 1972 Equal Employment Opportunity Act, the potential burden on the federal judiciary, duplication of the administrative process, prior federal employee discharge cases, and the need for prompt, consistent decisions in discrimination matters, and said: "Viewing the Act and its history broadly, Congress intended to guarantee *access* to the courts—'a civil action'—to eliminate previous barriers but not to start the process anew." Thus the court concluded that the Act provided for "access" but once there a trial de novo was not required under 42 U.S.C. § 2000e—16.

The holding in *Hackley* was followed in Tomlin v. United States Air Force Medical Center, 369 F.Supp. 353 (S.D. Ohio), and Handy v. Gayler, 364 F.Supp. 676 (D.Md.). The district court for the Northern District of California, relying on *Hackley* and *Handy*, reversed its earlier decision in Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, *supra*, and held that a trial de novo was not required under 42 U.S.C. § 2000e—16. Thompson v. United States Dep't of Justice, Bureau of Narcotics & Dangerous Drugs, 372 F.Supp. 762, rev'g 360 F.Supp. 255. No decisions by the United States Court of Appeals on this point have been found.

The legislative history is unclear. Senator Williams interpreted the Act as providing only review of agency (Civil Service Commission) proceedings. 118 Cong.Rec. S2280 (daily ed. Feb. 22, 1972) (History at 1727). Senator Cranston originally agreed with Senator Williams, 118 Cong.Rec. S2287 (daily ed. Feb. 22, 1972) (History at 1744). Later he corrected himself and stated that 42 U.S.C. § 2000e—16 provides for a trial de novo. 119 Cong. Rec. S1219 (daily ed. Jan. 23, 1973).

A distinction between federal and private employees is justified for the reasons stated by the court in Hackley v. Johnson, 360 F.Supp. 1274 (D.D.C.), and by the fact that the administrative proceedings relating to Government employees are always handled under the Civil Service system which has developed procedures and standards applicable to such employees. The complaints of the nature here considered should be handled as others, and if they reach the courts, the procedure should be consistent with those under 5 U.S.C. § 701 et seq. Thus there is a valid distinction to be made, and we hold that a de novo hearing is not here required.

The record before us, derived from the Civil Service system hearings and reviews, is detailed, and the facts are thoroughly developed. In the event a trial court should

find a need for additional facts on a particular issue, the matter may be remanded.

Our decision in Nickol v. United States, 501 F.2d 1389 (10th Cir.), was filed shortly after sumary judgment was granted against Salone. And in any event the opinion of the district judge gives sufficient indication of the facts relied on by him from the administrative record to support his conclusions as to the administrative decision.

The order of the district court affirming the decision of the Civil Service Commission Board of Appeals and Review is affirmed.

Supreme Court, U. S.
FILED
JAN 29 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1599

JEWELL D. CHANDLER, *Petitioner*,

v.

RICHARD L. ROUDEBUSH, ET AL., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 19, 1975

CERTIORARI GRANTED OCTOBER 6, 1975

13395-1-76

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[1] This is a Rule 36(4) deferred appendix. Original record page numbers are indicated in brackets. Volume 1 of the record contains the pleadings, orders, etc., in the district court and the court of appeals; page numbers in Volume 1 are indicated here as '[R. —]'. The exhibit volume of the record contains the certified administrative record of proceedings before the Veterans Administration and the Civil Service Commission; page numbers in the exhibit volume are indicated here as '[A.R. —]'. This format for indicating original record page numbers is the same as the citation format in the Brief for Petitioner, which brief cites only to the original record [*see*, Pet. Br. 4 n.1; Rule 36(5)].

[2] The administrative and judicial decisions below were printed in the appendix to the Petition for Certiorari, and are not reproduced here (*see*, Clerk's Memorandum to Counsel).

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APPENDIX

DOCKET ENTRIES

[R. 271]

United States District Court, Central District of California

[R. 272]

DATE PROCEEDINGS

8-9-73—Filed Complaint. . . .

9-5-73—Filed Plaintiff's notice of motion . . . & motion for Summary Judgment & memorandum, affidavit & exhibits in support thereof.
Filed Plaintiff's proposed findings of fact & conclusions of law.

10-18-73—Filed defendants' opposition to motion for Summary Judgment.
Filed defendants' Certified Administrative record.

10-19-73—Filed ANSWER to Complaint.

10-24-73—Filed plaintiff's reply to defendants' opposition to motion for Summary Judgment.

10-25-73—Filed USA supplemental memorandum in opposition to plaintiff's motion for Summary Judgment.

10-29-73—MINUTE ORDER: Hearing plaintiff's Motion for Summary Judgment. Counsel present & motion argued to Court. The Motion is Denied. Defendant to prepare papers. (MML)

10-30-73—Filed defendants' ORDER (MML) denying plaintiff's motion for Summary Judgment.

11-5-73—Filed plaintiff's Notice of deposition of Martin Holland on 11-30-73, & request for documents in connection therewith.

11-8-73—Filed plaintiff's Notice of deposition of Inocentes Dineros on 11-30-73 . . . .
Filed defendants' Notice of Motion . . . & motion for protective order; & Memorandum of points and authorities.

DATE PROCEEDINGS

11-19-73—Filed plaintiff's opposition to defendants' motion for protective order to prevent discovery.

11-26-73—MINUTE ORDER: Hearing defendant's Motion for protective order. Counsel present & motion argued to Court. Court orders discovery stayed thru 12-21-73. Cross Motions for Summary judgment & right of plaintiff for trial de novo are set for 12-21-73 at 11:00 A.M. Motions to be filed by 12-7-73 and responses to be filed by 12-17-73. (MML)

12-7-73—Filed Defendants' Notice of Motion . . . & motion to dismiss defendants Gordon R. Elliott & Martin C. Holland; Notice of Motion & Motion for Summary Judgment. Memorandum of points and authorities.

LODGED proposed findings of fact & conclusions of law.

LODGED proposed Judgment.

Filed plaintiff's Notice of Motion . . . & Motion for Summary Judgment & Memorandum & exhibit in support thereof.

LODGED proposed findings of fact & conclusions of law.

LODGED proposed Summary Judgment.

[R. 273]

12-11-73—Filed defendants' supplemental memorandum.

12-13-73—Filed plaintiff's supplemental memorandum.

12-17-73—Filed defendants' reply memorandum.
Filed plaintiff's opposition to defendants' motions for Summary Judgment & dismissal.

12-19-73—Filed plaintiff's reply memorandum.

12-21-73—MINUTE ORDER: Heard cross-motions for Summary Judgment. Counsel present & the motions are argued to the Court. The plaintiff's motion is denied. The defendants' motion for summary judgment is granted & each side to bear its own costs. (MML)

12-31-73—Filed findings of fact & conclusions of law: Filed judgment & order thereon that judgment be favor defendants dismissing complaint....

1-21-74—Filed plaintiff's NOTICE OF APPEAL....

[R. —]

United States Court of Appeals, Ninth Circuit

DATE PROCEEDINGS

11-5-74—CAUSE ARGUED & SUBMITTED TO TRASK, CHOY, & GOODWIN, CJJ.

4-25-75—ORDERED OPINION (GOODWIN) FILED & JUDGMENT TO BE FILED & ENTERED.

4-25-75—Filed Opinion—Affirmed.

4-25-75—Filed & Entered Judgment.

6-23-75—Filed Supreme Court notice re: filing petition for certiorari 6-19-75 SC # 74-1599.

10-23-75—Received certified copy of Supreme Court order granting petition for certiorari 10-6-75.

COMPLAINT

[R. 1]

STUART P. HERMAN
Attorney at Law
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(213) 273-5540

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Filed August 9, 1973)

CIVIL No. 73-1863-MML
JEWELL D. CHANDLER,
Plaintiff,

VS.

DONALD E. JOHNSON, in his official capacity as Administrator of Veterans Affairs, Veterans Administration; GORDON R. ELLIOTT, in his official capacity as Director, Veterans Administration, Los Angeles Regional Office; MARTIN C. HOLLAND, in his official capacity as Adjudications Officer Veterans Administration, Los Angeles Regional Office; and THE UNITED STATES OF AMERICA,
Defendants.

CIVIL RIGHTS COMPLAINT FOR INJUNCTION AND OTHER EQUITABLE RELIEF IN CONNECTION WITH EMPLOYMENT PRACTICES

1. The jurisdiction of this Court is invoked pursuant to Section 717(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.* which provides for injunctive and affirmative relief against dis-

crimination in Federal government employment based on race, color, sex or national origin. The unlawful employment practices herein described occurred and are occurring in the Central District of California.

2. Defendant Donald E. Johnson at all relevant times mentioned herein was and is the Administrator of Veterans Affairs and as such is the "head" of the Veterans Administration,

[R. 2]

Washington, D.C. as that term is used in Section 717, 42 U.S.C. 2000(e) *et seq.* Defendant Gordon R. Elliott at all relevant times mentioned herein was and is the Director of the Los Angeles Regional Office of the Veterans Administration and as such is the "head" of the Region where the alleged unfair employment practice occurred. Defendant Martin C. Holland at all relevant times mentioned herein was and is the Adjudications Officer of the Los Angeles Regional Office of the Veterans Administration and as such is the "head" of the unit as that term is used in Section 717, 42 U.S.C. 2000(e) *et seq.* The individual defendants are being sued in their official capacities as heads of the various appropriate branches of the Veterans Administration. Proper Venue upon Donald E. Johnson is invoked pursuant to 28 U.S.C. 1391(e).

3. Plaintiff Jewell D. Chandler, a black female, now is and for many years has been a resident of the County of Los Angeles and an employee of the Veterans Administration, Los Angeles Region. Plaintiff is among the specific class of persons intended to be benefited by Title VII of the Civil Rights Act of 1964, and Executive Order 11478 and brings this action on behalf of herself and all persons similarly situated.

4. Plaintiff is employed as a Veterans Claims Examiner in the Adjudication Division of the Los Angeles Region

of the Veterans Administration. She has held that position since October 8, 1969, and is currently in the grade level of GS-12.

5. Plaintiff pursuant to undated Veterans Administration Promotional Announcement No. 80-72, applied for the position of Supervisory Veterans Claims Examiner, a GS-13 grade level. By notice dated August 29, 1972, she was informed that she had ranked "highly qualified" and was being considered for the position.

[R. 3]

On September 8, 1972, plaintiff was informed that a nonblack, male who had received a lower employee evaluation rating had been selected for the position.

6. On September 25, 1972, Plaintiff pursuant to regulations of the United States Civil Service Commission filed a timely Complaint of Discrimination in the Federal Government (CSC Form 894) alleging discrimination based on race, color and sex by the Veterans Administration in violation of Executive Order 11478 and Title VII of the Civil Rights Act of 1964 as amended.

Upon being informed that the Veterans Administration had failed or refused to informally resolve her grievance, Plaintiff on November 17, 1972, timely advised the Veterans Administration pursuant to Civil Service Commission regulations that she wanted a formal hearing on her complaint.

7. On January 26, and January 29, 1973, a formal hearing was held in Los Angeles, California, before a Civil Service Commission Complaints Examiner, during which ten witnesses testified under oath and numerous documents were considered.

8. Subsequent to the conclusion of the hearing, the Complaints Examiner issued a 20-page Finding and Recommended Decision based on the hearing record in which the Complaints Examiner concluded that Plaintiff had unlaw-

fully been discriminated against in not being selected for the position and recommended:

> "I recommend that complainant be promoted immediately to GS-13, Supervisory Veterans Claims Examiner, effective retroactively to September 17, 1972. When the Agency considers complainant in future promotion actions, complainant shall receive experience as if she *actually occupied* the GS-13 Section Chief Position on September 17, 1972" (Emphasis in original)

[R. 4]

9. By letter dated March 21, 1973, Plaintiff was informed of the Complaints Examiner's Conclusion and Recommendation by Kenneth M. Meyer, Acting Assistant General Counsel of the Veterans Administration in Washington, D. C. However, in the letter Plaintiff was advised that Mr. Meyer, representing the Veterans Administration, was rejecting the Conclusion and Recommendation of the Civil Service Commission Complaints Examiner and was further advised that she had a right to appeal his rejection to the Civil Service Commission Board of Appeal and Review in Washington, D. C.

10. On April 3, 1973, Plaintiff filed a timely appeal with the Civil Service Commission Board of Appeal and Review requesting that the recommended decision of the Complaints Examiner be implemented. By letter dated July 18, 1973, dispatched from Washington, D.C. and received on July 23, 1973, in Los Angeles, California, Plaintiff was informed by the Chairman of the Civil Service Commission, Board of Appeals and Review that her appeal was rejected and advising her that she was authorized to file a civil suit in Federal Court under Section 717(c) of the Civil Rights Act of 1964, as amended, within 30 calendar days of receipt of the July 18, 1973, letter.

11. On information and belief, Plaintiff alleges that she was denied, by defendants, equal employment opportunities based on unlawful and subjective employment criteria which do not measure the ability of an applicant to perform the sought after job and which have a disproportionate impact on women and blacks in violation of the Civil Rights Act of 1964, as amended and Executive Order 11478.

12. The above-described discriminatory employment practices based on sex or race constitute a violation of 42

[R. 5]

U.S.C. 2000(e) *et seq.*, the Civil Rights Act of 1964, as amended as well as Executive Order 11478. Unless preliminarily and permanently restrained by this Court, defendants will continue to pursue the same or similar discriminatory employment practices alleged in this complaint. If defendants are permitted to continue their discriminatory employment practices, Plaintiff and all others similarly situated will be denied equal employment opportunity as guaranteed by law. Such denial will cause Plaintiff and all others similarly situated serious and irreparable injury and monetary loss.

WHEREFORE, Plaintiff prays that defendants and each of them and their representatives, successors and all persons in active concert or participation with them be preliminarily and permanently enjoined from engaging in any discriminatory employment practice based on race, color or sex and specifically from:

(a) Failing or refusing to establish bona fide employment practices, procedures and standards which will prevent continued discrimination in hiring or promotion.

(b) Failing or refusing to discontinue employment practices, procedures and standards which have a disproportionate detrimental impact upon blacks and women and are not related to ability to perform the job sought.

(c) Failing or refusing to take appropriate measures to overcome the present effects of past discriminatory practices and policies, including the following affirmative steps:

(1) Implementing the Recommendation of the United States Civil Service Commission Complaints Examiner insofar as it relates to plaintiff and all other blacks and women similarly situated.

(2) Hiring and promoting sufficient qualified blacks and female applicants for positions at the Veterans

[R. 6]

Administration on an accelerated basis as is necessary to overcome the effects of past discriminatory employment practices based on race, color or sex.

(3) Providing monetary compensation to Plaintiff and all other blacks and females similarly situated for the monetary losses they have suffered as a result of defendants' failure or refusal to hire or promote them on an equal basis with nonblacks and men.

(4) Taking such other reasonable action as is necessary to overcome the present and future effects of defendants' past discriminatory practices, policies and actions.

Plaintiff further prays that this Court grant such other and further relief as the interests of justice require, including but not limited to Plaintiff's costs and disbursements herein and Plaintiff's reasonable attorney's fees.

Dated: August 9th, 1973.

/s/ Stuart P. Herman
Stuart P. Herman
Attorney for Plaintiff

(Verification Omitted In Printing)

NOTICE OF DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS IN CONNECTION THEREWITH

[R. 146]

United States District Court
Central District of California

(Filed November 5, 1973)

Civil No. 73-1863-MML

Jewell D. Chandler, *Plaintiff*,

v.

Donald E. Johnson, etc., et al., *Defendants.*

Notice of Deposition and Request for Production of Documents in Connection Therewith

TO: Edward M. Kritzman, Clerk, United States District Court Central District of California; William D. Keller, Esquire, United States Attorney, Defendants' Attorney of Record and Rex Heeseman, Esquire, Assistant United States Attorney, Defendants' Attorney of Record:

Please Take Notice that on the 30th day of November, 1972, at 2:00 p.m., in the Office of Attorney Stuart P. Herman, 9601 Wilshire Boulevard, Suite 632, Beverly Hills, California, and continuing until completion, the Plaintiff, pursuant to Rules 30 and 34 of the Federal Rules of Civil Procedure will depose Defendant, Martin Holland, Adjudications Officer, Veterans Administration, Los Angeles, California.

Mr. Holland is also requested to produce all documents, papers, books, letters, personnel files, records,

[R. 147]

or other tangible things relating to the filling of the position of Supervisory Veterans Claims Examiner pursuant to

Veterans Administration, Los Angeles Region, Promotional Announcement No. 80-72.

You are invited to attend and cross-examine.

Dated this 30th day of October, 1973.

/s/ STUART P. HERMAN
Stuart P. Herman
Attorney for Plaintiff
9601 Wilshire Blvd., Suite 632
Beverly Hills, CA 90210

(AFFIDAVIT OF SERVICE OMITTED IN PRINTING)

NOTICE OF DEPOSITION

[R. 149]

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

(FILED NOVEMBER 8, 1973)

CIVIL No. 73-1863-MML

JEWELL D. CHANDLER,

Plaintiff

v.

DONALD E. JOHNSON, etc., et al.,

Defendants.

NOTICE OF DEPOSITION

TO: EDWARD M. KRITZMAN, Clerk, United States District Court Central District of California; WILLIAM D. KELLER, Esquire, United States Attorney, Defendants' Attorney of Record and REX HEESEMAN, Esquire, Assistant United States Attorney, Defendants' Attorney of Record:

PLEASE TAKE NOTICE that on the 30th day of November 1973, at 3:00 p.m., in the office of Attorney Stuart P. Herman, 9601 Wilshire Boulevard, Suite 632, Beverly Hills, California, and continuing until completion, the plaintiff,

pursuant to Rule 30 of the Federal Rules of Civil Procedure will depose Inocentes Dineros, Veterans Administration, Los Angeles, California.

You are invited to attend and cross-examine.

Dated this 1st day of November, 1973.

/s/ STUART P. HERMAN
Stuart P. Herman
Attorney for Plaintiff
9601 Wilshire Blvd., Suite 632
Beverly Hills, CA 90210

(AFFIDAVIT OF SERVICE OMITTED IN PRINTING)

DISTRICT COURT OPINION

[THE OPINION OF THE DISTRICT COURT IS PRINTED AT PAGES 30A-33A OF THE APPENDIX TO THE PETITION FOR CERTIORARI].

DISTRICT COURT JUDGMENT

[R. 257]

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

(FILED DECEMBER 31, 1973)

CIVIL No. 73-1863-MML

JEWELL D. CHANDLER,

Plaintiff

v.

DONALD E. JOHNSON, etc., et al.,

Defendants.

JUDGMENT

Both parties brought on for hearing motions for summary judgment before the Honorable Malcolm M. Lucas, United States District Judge, on the 21st day of December,

1973. Plaintiff appeared through her attorney, Stuart Herman, and defendants appeared through their attorneys, William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant U.S. Attorney, Chief, Civil Division, by Rex Heeseman, Assistant U.S. Attorney.

The Court, after having considered the pleadings, the memoranda, the administrative record, all filings and the oral argument at the time of hearing, and in accordance with the Findings of Fact and Conclusions of Law entered herein, hereby rules:

IT IS ORDERED, ADJUDGED, and DECREED that judgment be and the same is hereby entered in favor of defendants and

[R. 258]

against plaintiff, dismissing plaintiff's complaint and affirming the administrative decision herein.

Both parties will bear their own costs.

DATED: This 27 day of December, 1973.

/s/ MALCOLM M. LUCAS
UNITED STATES DISTRICT JUDGE

(CERTIFICATE OF SERVICE OMITTED IN PRINTING).

COURT OF APPEALS OPINION

[THE OPINION OF THE COURT OF APPEALS IS PRINTED AT PAGES 34A-41A OF THE APPENDIX TO THE PETITION FOR CERTIORARI].

COURT OF APPEALS JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEWELL D. CHANDLER,
Appellant,

v.

DONALD E. JOHNSON, in his official capacity as Administrator of Veterans Affairs, Veterans Administration; etc., et al.,
Appellees.

No. 74-1596

DC # 73-1863

APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered April 25, 1975.

COMPLAINTS EXAMINER'S FINDINGS AND RECOMMENDED DECISION

[THE COMPLAINTS EXAMINER'S FINDINGS AND RECOMMENDED DECISION ARE PRINTED AT PAGES 1A-17A OF THE APPENDIX TO THE PETITION FOR CERTIORARI].

VETERANS ADMINISTRATION DECISION

[THE VETERANS ADMINISTRATION DECISION IS PRINTED AT PAGES 18A-21A OF THE APPENDIX TO THE PETITION FOR CERTIORARI].

CIVIL SERVICE COMMISSION DECISION

[THE CIVIL SERVICE COMMISSION DECISION IS PRINTED AT PAGES 21A-29A OF THE APPENDIX TO THE PETITION FOR CERTIORARI].

CLOSING STATEMENT OF COMPLAINTS EXAMINER[1]

[A. R. 118]

CLOSING STATEMENT OF COMPLAINT EXAMINER

[January 29, 1973]

After hearing additional information from Mrs. Chandler during the pre-hearing conference about what testimony she expected from 19 witnesses I had previously tentatively [dis]approved, I reconsidered my decision and approved the appearance of four additional witnesses: Mr. Robert Crawford, Mr. John Walker, Mrs. Murrell Long and Mr. Moss Inouye. Mrs. Murrell Long did not appear at the hearing because she did not wish to testify. Mrs. Chandler decided that it would not be necessary to call Mr. Gilbert Thompson, a previously approved witness. I disapproved the appearance of the other 15 requested witnesses identified in Mrs. Chandler's letter to me of December 28, 1972 because their expected testimony did not bear directly on the issue of whether the VA discriminated against Mrs. Chandler because of race and sex in not selecting her for the GS-13 Section Chief position. The complaint file had already sufficiently developed information relating to the general atmosphere out of which the complaint arose. Neither the complainant nor the agency representative offered any documents into evidence. I have as Complaint Examiner requested certain additional information in writing from the agency. I will carefully review that material in order to include only that which is relevant and material and to insure that there is no invasion of privacy of other individuals incidentally involved in this action. Copies of material added to the record by me will be furnished to both parties.

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[1] The remaining items in this appendix appear, as in the Administrative Record, in reverse chronological order.

I will as early as possible consider the evidence and report my findings and recommendation to the agency head or designated deciding official. A decision will be furnished in writing by the responsible agency official.

• • •

LETTER FROM COMPLAINTS EXAMINER TO PETITIONER

[A. R. 141]

January 17, 1973

Mrs. Jewell D. Chandler
5719 Aladdin St.
Los Angeles, CA 90008

Dear Mrs. Chandler:

Reference your letter of December 28, 1972 concerning your requested witnesses for your EEO hearing. After a careful review of the complete complaint file and the expected testimony I have tentatively disapproved the following:

Mr. Paul Lente	Mr. Albert Walker
Mr. Robert G. Crawford	Mrs. Harriett K. Jones
Mr. Inocentes Dineros	Miss Alberta Franklin
Mr. Ira W. Clairborne	Mr. Milton Thompson
Mrs. Jeanette Stittsworth	Mr. Willie Edwards
Mr. John C. Walker	Mrs. Thelma Prince
Mrs. Murrell Long	Mr. Moss Inouye
Mrs. Elizabeth Bricker	Mrs. Earline Evans
Mr. William Hall, Jr.	Mr. Donald Baker

Mrs. Catherine Hogan

I have disapproved these witnesses because they do not appear to have direct knowledge related to your non-selection for the position of Section Chief.

If you have additional reasons for calling any of the above-named witnesses, I will reconsider those reasons during

the pre-hearing conference. If I determine at that time they should be included, I shall call them; however, my final decision on each witness will be made a part of the record during the hearing.

Sincerely

Edna E. J. Francis
EEO Complaints Examiner

LETTER FROM COMPLAINTS EXAMINER TO DIRECTOR, VETERANS ADMINISTRATION REGIONAL OFFICE

[A. R. 142]

January 9, 1973

Mr. Gordon R. Elliott
Director
VeteransAdministration
Regional Office
11000 Wilshire Blvd.
Los Angeles, CA. 90024

• Date of hearing: 1/25/73
Time of hearing: 9:00 a.m.
Place of hearing: Room 7301,
11000 Wilshire Blvd.
Los Angeles, CA. 90024

Dear Mr. Elliott:

After considering the complaint file in the discrimination complaint of Jewell D. Chandler and Mrs. Chandler's request for witnesses, I have determined that the following employees of your agency have pertinent information to offer at the hearing.* Please direct the following employees to be present at the hearing to testify:

Mr. Rudolf Beiser
Mr. Martin Holland
Mr. Dominic Ballanti
Mr. Gilbert M. Thompson
Mr. Amos E. Tessier
Mrs. Catherine M. Weden

Mrs. Margarette Fillerup

Their attendance at the hearing will be official business for all purposes. They should be assured freedom from re-

straint, interference, coercion, or reprisal in connection with their appearances as witnesses.

Sincerely,

Edna E. J. Francis
Equal Employment Opportunity
Complaints Examiner

cc: Mrs. Jewell D. Chandler
5719 Aladdin St.
Los Angeles, CA. 90008

LETTER FROM PETITIONER TO COMPLAINTS EXAMINER

[A. R. 143]

VETERANS ADMINISTRATION
REGIONAL OFFICE
Federal Building
11000 Wilshire Boulevard
Los Angeles, California 90024

Date: December 28, 1972
In Reply
Refer to: 344/211 (1J)

Ms. Edna E. J. Francis
Complaints Examiner
U.S. Civil Service Commission
851 South Broadway
Los Angeles, CA 90014

Dear Ms. Francis:

Reference is made to your letter dated December 19, 1972 at which time You requested that I submit to you the name of my Representative and the names of witnesses.

From August 23, 1972 through August 27, 1971, I attended the Veterans Administration Appeals Examiner Institute at Salt Lake City, Utah after having been appointed an

Appeals Examiner by the Area Field Director, Washington, D. C. For this Hearing, I have decided to represent myself because I am familiar with policy and procedure referrable to a formal hearing, and of the organizational structure of the office in which I am employed. I would like to reserve the right to have a person sit with me in an advisory capacity, not to represent me, whose name will be submitted within 10 days of this letter.

Complainant's Representative: Jewell D. Chandler, Complainant.

Witnesses complainant wishes to present are:

Mr. Rudolph Beiser, Personnel Officer

Reason: To present clarification of many of Personnel's actions in the hiring and promotional policies.

Mr. Martin C. Holland, Adjudication Officer

Reason: He is the discriminating official.

Mr. Dominic Ballanti, Section Chief (Supervisory Claims Examiner, GS-13)

Reason: He has been the supervisor to the promotee, Mr. Inocentes Dineros and the Complainant.

Mrs. Margarette M. Fillerup, Section Chief (Supervisory Claims Examiner, GS-13)

Reason: She was Mr. Dineros' supervisor at the time of his promotion, and his superior performance award.

[A. R. 144]

Mr. Gilbert M. Thompson, Section Chief, (Supervisory Claims Examiner, GS-12)

Reason: Supervisor to the Complainant.

Mr. Paul Lentz, Section Chief, (Supervisory Claims Examiner)

Reason: Was promoted prior to becoming proficient in any area of the Adjudication Division.

Mrs. Catherin Hogan, Veterans Claims Examiner, GS-12.

Reason: Detained in an area of employment below the grade to which promoted.

Mr. Robert G. Crawford, Veterans Claims Examiner, GS-12.

Reason: Has worked closely with the Complainant, and the promotee, Mr. Inocentes Dineros.

Mr. Inocentes Dinercs, the promotee, and now Supervisory Veterans Claims Examiner, GS-13 (Section Chief)

Reason: He is the employee whose promotion I am contesting.

Mr. Ira W. Claiborne, Legal Rating Specialist, GS-12 (Veterans Claims Examiner)

Reason: A proficient employee who does not comply to to the "Buddy System", but stands on productive ability.

Mrs. or Miss Jeanette Stittsworth, Veterans Claims Examiner, GS-12.

Reason: Has Proficiency in cne area of Adjudication who has been allowed to specialized.

Mr. John C. Walker, Vetrans Claims Examiner, GS-11

Reason: Mr. Dineros was his Authorizer, whose promotion I am contesting.

Mrs. Murrell Long, Veterans Claims Examiner, GS-11

Reason: Refused to sign deposition given under oath by the EEO Investigator.

Ms. Elizabeth Bricker, Veterans Claims Examiner, GS-9

Reason: To provide validity to the allegation of training.

Mr. Albert Walker, Veterans Claims Examiner, GS-9

Reason: Has been overlooked for promotion 10 times.

Mrs. Harriett K. Jones, Veterans Claims Examiner, GS-12

Reason: Overlooked for promotion in favor of less qualified males.

Miss Alberta Franklin, Veterans Claims Examiner Trainee, GS-7

Reason: To attest to the promotee and the complainant.

Mr. Milton Thompson, Claims Clerk, GS-6

Reason: Has been assigned to one unit longer than any other clerk and has ability to perform in a greater capacity.

Mr. Willie Edwards, Veterans Claims Clerk, GS-6

Reason: President of the Employee's Union, Conflicts with management regarding hiring policy.

[A. R. 145]

Mrs. Thelma Prince, Supervisory Clerk, GS-6

Reason: To provide validity to my allegation of discrimination in promotion policy.

Mr. Moss Inouye, Veterans Benefits Counselor, GS-9

Reason: To attest to my ability to provide information in all phases in Adjudication.

Mrs. Earline Evans, Veterans Claims Clerk, GS-5

Reason: Has been continually assigned to one area and has been continuously overlooked for promotion many times.

Mr. William Hall, Jr., Rating Specialist, GS-12, (Veterans Claims Examiner).

Reason: A disabled veteran, used the V. A. Education bill to graduate from law school, and offered a position as a GS-2. Mr. Hall is a law school graduate.

Mr. Donald Baker, GS-4 (?) Loan Guaranty Clerk.

Reason: Scored 100% on the Federal Service Entrance Examination, qualifying for a GS-5 and GS-7 position, and was hired as a GS-2. He is also a disabled veteran.

Respectfully Submitted,

/s/ JEWELL D. CHANDLER
(Mrs.) Jewell D. Chandler
Complainant
5719 Aladdin Street
Los Angeles, CA 90008
Telephone:
At Work: (213) 824-7419
At Home: (213) 299-1461

INVESTIGATOR'S REPORT AND INDEX OF EXHIBITS

[A. R. 156]

VETERANS ADMINISTRATION REGIONAL OFFICE
11000 Wilshire Boulevard
Los Angeles, California 90024

EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT
OF MRS. JEWELL CHANDLER

I. DESCRIPTION OF INVESTIGATION

A. Investigator: Mr. Robert H. Mark
Chief, Recreation Therapy PMRS
VA Hospital, Sepulveda, California
91343.

B. Date Case Received: October 5, 1972.

C. Date Report of Investigation submitted to Equal Employment Opportunity Officer: October 25, 1972.

D. Place of Investigation: Veterans Administration Regional Office, Los Angeles, California 90024

E. Dates of Investigation: October 10, 1972—October 25, 1972.

II. DESCRIPTION OF COMPLAINT

A. Date filed: September 25, 1972.

B. Title and Grade of Complainant's Position: Veterans Claims Examiner GS-12.

C. Name and Location of Agency and Unit involved in the Complaint: Veterans Administration Regional Office, Los Angeles, California 90024, Adjudication Division.

D. Nature of Action Giving Rise to Complaint: Non-selection of Complainant, Mrs. Jewell Chandler, Veterans Claims Examiner GS-12, on a Posted Promotional Announcement No. 80-72 for GS-13 Section Chief Position.

E. Date of Alleged Discrimination: September 14, 1972.

F. Kind of Discrimination: Racial and Sex.

G. Identity of Alleged Discriminating Official: Mr. Martin C. Holland, Adjudication Officer, Los Angeles Regional Office.

[A. R. 157]

GENERAL ENVIRONMENT

This complaint arises in the Adjudication Division, Los Angeles Regional Office.

This Division has some 276 employees whose grades range from GS-3 to GS-15. The ethnic breakdown of the Division is as follows: 180 Caucasian employees; 69 Black employees; 27 employees of other minorities such as Mexican-Americans, Japanese-Americans and Filipino-Americans. The grade structure breakdown is:

159 employees Grades 9-15 including:
114 Caucasians, 30 Blacks, 15 other;
117 employees Grades 3-7 including
66 Caucasians, 39 Blacks, 12 other.

The grade breakdown by sex is:

159 employees Grades 9-15
113 males and 46 females
117 employees Grades 3-7
57 males and 60 females.

The Division is divided into 9 sections, each with a Section Chief GS-13. The three major areas of responsibility are:

Rating Board, Authorization and Counseling and Training. The complaint arose from the Authorization area, where the complainant functions as an Authorizer GS-12. The two major areas of responsibility of Authorization are to handle veterans' claims concerning compensation and pension and claims for educational benefits. The Table of Organization for each of the 6 sections in Authorization is:

1 Section Chief GS-13

2 Authorizers GS-12

1 Senior Adjudicator GS-11.

The complainant is considered by her co-workers and supervisors to be a very competent, intelligent worker, as evidenced by her five promotions in the past six years and her High Quality increase awarded in 1970 (Exhibit 31).

She is an effective speaker and her talents have been utilized rather consistently, to orient and train employees, Service Field representatives and veterans as to the pertinent laws and their ramifications. She, as a rule, shared the panel table and rostrum with GS-13 Section Chiefs although her grade and position were lower.

She is active in employee organizations and is currently Federal Women's Program Coordinator and Chairwomen of the E.E.O. Subcommittee for Women.

[A. R. 158]

III. FINDINGS

Allegation No. 1—Mrs. Chandler was not selected for promotion because she is black.

A. Mr. Holland (Adjudication Officer, Exhibit 2) stated: "I'm interested in getting Section Chiefs who will do the best job . . . . I'm not at all concerned with race or sex in filling these positions . . . ."

"Vacancies are filled through the station promotion plan. All applicants are evaluated by their supervisors, an evaluation panel set up to determine the qualifications of each applicant. An interview panel is set up to interview the 'highly qualified' applicants and we try to make a consensus choice. However, in the final analysis, I must be the selecting official as Chief of the Service." (See Exhibit 27, Promotion Plan.)

"We try to avoid pre-selection. In a Division as large as ours, the panel is a necessity because I cannot know everything about each employee."

"Mrs. Chandler has not been in Adjudication as long (as Mr. Dineros, who was selected) and has not been an Authorizer as long."

"The law degree (Dineros has one, Chandler does not) is not necessary for a Section Chief's position but "it's desirable".

"If we have someone with a law degree who shows promise, his promotions, probably, will come faster than if he didn't have it."

"There is no particular reason why we have no Black Section Chief. It's not a matter of discrimination. I would say that other candidates were considered to be better able to fill the positions. This is not to say that we won't have a Black Section Chief sometime."

"Our primary concern is to get the person into the job who will do the best job for us, the veterans and the VA, and we don't care what the person's race may be."

B. Mrs. Fillerup (Section Chief, Exhibit 13) stated: "I feel Jewell Chandler has been given fair consideration during her employment and she has been selected for special projects over others."

"I know of no campaign on the part of the Adjudication Officer to keep Blacks or Black females from becoming a Section Chief."

C. Mrs. Weden (Section Chief, Exhibit 17) stated: "In my judgment, Mrs. Chandler received fair and equal treatment in this promotional opportunity, although this does not mean I am in full agreement with the selection."

[A. R. 159]

"This is a judgment decision and I tried to be as fair as I could."

"I do not feel any individual should be given preferential treatment because of their race or sex, nor do I feel they should be restrained for these reasons."

D. Mr. Ballanti (Section Chief, Rating Board and Evaluation Panel Member, Exhibit 3) stated: "We went through the Personnel folders of the candidates and began evaluating (according to the ground rules, Exhibit 28) and came up with seven candidates rated 'highly qualified'."

(The highly qualified group included: 1 Black female (Chandler); 2 Black males; 1 Filipino-American (Dineros); 2 white females; 1 white male)

"To my recollection, Mrs. Chandler rated very high." (Dineros 167 points, Chandler 165 points. They were the two highest.)

"I do not know if the Adjudication Officer was aware of the numerical rating of those in the 'highly qualified' group."

"I feel this is a very fair and objective method of selection."

E. Mr. Tessier (Section Chief—Rating Board and Interview Panel Member, Exhibit 20):

"It is my experience that those on the interview panel do not know the numerical rankings of those candidates in the 'highly qualified' group."

F. Mr. Crawford (Veterans Claims Examiner GS-12, Exhibit 16) stated:

"I, personally, do not feel there is discrimination toward Blacks or Black females in the Adjudication Division. However, had I been the selecting official . . . I would have selected Mrs. Chandler over Mr. Dineros. I have worked with both and feel Mrs. Chandler tries to be more helpful to employees . . . does not hesitate to make decisions . . . ."

G. Manuel Pacheco (Veterans Claims Clerk, Exhibit 9), stated:

"Regarding discrimination toward Blacks, I have the definite feeling that management does not want a Black Section Chief. I have been here since 1956 and I have never seen one."

CONCLUSION

The evidence does not support this allegation . Although there are, presently, no Black Section Chiefs, other minority groups are represented at this level. I was unable to detect any pre-selection or plan to keep Blacks from becoming Section Chiefs.

[A. R. 160]

The investigation indicated that this action was handled in full accord with the Station promotion plan. The interview panel was unable, apparently, to reach a consensus choice and the Adjudication Officer cast the deciding vote for the selectee. The result was a 2-1 split for Mr. Dineros.

The investigation detected no "pre-selection" of Mr. Dineros or pressure from the Adjudication Officer on the members of the interview panel to insure his selection.

FINDINGS

Allegation No. 2—Mrs. Chandler was not promoted because she is a female.

A. Mr. Holland (Adjudication Officer, Exhibit 2) stated: "I'm not at all concerned with race or sex in filling these positions, but only in finding the one who can do the best job."

There are two white female Section Chiefs. "Mrs. Fillerup was a Section Chief when I came. Mrs. Weden had been an Authorizer and was the Assistant Chief of the Administrative Division. I did concur in her lateral transfer back to Adjudication."

"Of our 14 Authorizers, 5 are female and we have 2 female Section Chiefs."

Referring to the August 1972 promotions to GS-11, when 11 promotions were made including only 1 female: "There was no intent to downgrade females. We select the best people regardless of sex. There were several women in the 'highly qualified' group but we felt we promoted the people who would do the best job."

"Men must, also, perform. Potential, alone, is not sufficient to promote. Potential and performance are both considered for both men and women."

B. Mr. Crawford (Veterans Claims Examiner, Exhibit 16) stated: I, personally, do not feel there is discrimination toward Blacks or Black females in Adjudication."

CONCLUSION

The evidence does not support this allegation. Although the alleged discriminating official was only involved in the selection of one female as a unit head, the presence, currently of 2 female Section Chiefs (white) seems to preclude

a plan to keep females from an opportunity to function at this level.

[A. R. 161]

FINDINGS

Allegation No. 3—Females are discriminated against in promotional opportunities.

A. Mrs. May (Veterans Claims Examiner, Exhibit 14) stated: "I'm not sure if it's because of my age (62) or because I'm a female but I don't feel I have been treated fairly by whomever promotes you in Adjudication."

"I, definitely, feel the Adjudication Officer prefers to promote men."

"I came to Adjudication in 1965 . . . and have not received a promotion since coming here."

"I feel I am promotionally handicapped because I am a female and because of my age. I have put in for a GS-11 position on five different occasions and I do not feel that with the number of promotions made that my qualifications and job performance are that inadequate to warrant passing over me five times."

B. Mrs. Jones (Veterans Claims Examiner, Exhibit 6) stated: "I, definitely, feel that I have been discriminated against because I'm a middle-aged female. I don't feel proper promotional consideration is accorded to me. . . ."

"The favored employees seem to be the young, degreed or law graduate males."

"However, on the practical side, the young lawyears do not stay with us, even though they are promoted. They do not have the opportunity to find

out how to do the job because of the rapidity of their promotions and the increasing workload has to be carried by those of us who have the knowledge and ability but not the degrees. Yet, we do not get the opportunity to advance in grade."

C. Earline Evans (Veterans Claim Clerk, Exhibit 5) stated: "I can only speak of my personal frustrations because they are somewhat typical of what black females, in general, experience . . . . Unless you are the type who can easily massage the ego of the Division Chief, you can't get ahead. I have had good evaluations . . . , a good work record and yet I cannot get promotions."

D. Alberta Franklin (Veterans Claims Examiner, Exhibit 10, stated: "I think female black employees, that I feel are qualified for advancement, have not been promoted. Many times these black women have trained the people who were promoted over them. Many are . . . white."

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E. Manuel Pacheco (Veterans Claims Clerk, Exhibit 9) stated: "In September 1972, I applied for a GS-6 Veterans Claims Clerk position, was rated 'Highly Qualified,' granted an interview but was not selected. There were six positions . . . five females and one male (3 Black, 2 Caucasian and 1 Japanese-American) were selected."

"Regarding discrimination toward females, in the Veterans Claims Clerk area, I feel they are getting a better break than men. More women have received GS-6's than men. Since the women's liberation movement, I feel they have gotten the better of the promotions on the GS-6 level."

F. Jack Feurstein (Veterans Claims Examiner, Exhibit 15) stated: "I don't feel there is any discrimination here regarding race or sex."

G. Mr. Holland (Adjudication Officer, Exhibit 2) stated: "There was no intent to downgrade females. We select the best people regardless of sex."

"Of our 14 Authorizers, five are female and we have two female Section Chiefs."

Regarding keeping alert for capable employees—"... Generally through the Supervisors and Section Chiefs, they keep me informed on those employees who appear to be capable on both posted and unposted promotions."

CONCLUSION

Although there seems to be a somewhat prevalent feeling among females that they do not, always, receive promotional equality with men, this investigation was unable to detect any overt move in this regard.

The breakdown of the Service shows 46 females functioning at above the GS-9 level, as opposed to 113 men in the same grades. 60 women are functioning at Grades GS-3 to GS-7, as opposed to 57 males at this same level.

A sizable contribution to the feelings of discrimination regarding promotions by the females seems to stem from the new male employees, usually with degrees, etc., being hired from outside the agency; being trained by employees with more seniority but receiving promotions at a much faster rate than the people who train them.

A better understanding, by employees, of general hiring aims, achieving balance between hiring from the outside and promoting from within, men and women, would alleviate some of the discriminatory feelings.

There seems to be a feeling that management prefers to hire and promote new, untried people rather than giving employees they already have a chance to fill a higher level position.

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FINDINGS

Allegation No. 4—General discrimination against Blacks is practiced in Adjudication in regard to promotions.

A. Mr. Holland (Adjudication Officer, Exhibit 2) stated: "When we hire outside, we go to the register and I do not recall interviewing any non-Caucasians. The minority people just aren't appearing on the register."

"We do not practice discrimination in promotions. I feel the percentage distribution among our minority employees shows this."

"I do not feel this feeling of discrimination is a general one but, perhaps, some employees feel that way."

Regarding "grooming employees for promotion"—"What we try to do is give capable employees tasks that they can perform. I don't feel this is grooming for promotion."

"We try to encourage people to prepare themselves for a better job. We have a course in correspondence . . . We set up a law course for employees without law degrees . . . We are trying to get many things done, some here, some at the University of West Los Angeles."

B. Ira Claiborne (Legal Rating Specialist, Exhibit 7) stated: "I, definitely, feel racial discrimination at this station is very flagrant. It permeates every

facet of the Authorization and Rating Board procedures. In fact, I have filed a grievance charging racial discrimination against me in the same promotional situation that Mrs. Chandler did. My grievance has completed the informal stage and I will file next week for a formal investigation into the matter."

C. Milton Thompson (Veterans Claims Lead Clerk, Exhibit 4, stated: "I feel that there is general discrimination toward promotion of Blacks and I, personally, feel discriminated against because I have been assigned to the Education Section since 1967. . . . I wish to broaden my experience to enhance my promotional potential."

"I have trained or assisted in the training of many white employees who have been selected for the Adjudicator trainee position over me."

"To my knowledge there has been no Black male promoted 'from the floor' (non-degreed people) to a GS-7 Adjudicator trainee position since 1967. Some white employees have been promoted 'from the floor'."

D. Miss Franklin (Veterans Claims Examiner, Exhibit 10) stated: "I have felt some discrimination toward me, personally, because it is my feeling that they are not promoting enough people from the inside,

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but, instead, are bringing in new employees, primarily white employees, from the outside."

"I, definitely, feel that employee morale is quite low in Adjudication, particularly among the Black employees. . . . Morale is low primarily because of the absence of promotional equality from the Clerk level to the Examiner (trainee) level."

E. Mrs. Evans (Veterans Claims Clerk, Exhibit 5) stated: "There is such a negative atmosphere here that good employees are walking out because they cannot tolerate the situation. Check the turnover in personnel and the use of sick leave on this. We are in trouble here and need to have something done."

F. Mr. Pacheco (Veterans Claims Clerk, Exhibit 9) stated: "Regarding discrimination toward Blacks . . . At the Clerk level, I feel the Blacks have received fairer treatment on promotions than the Mexican-Americans."

G. Jack Feurstein (Veterans Claims Examiner, Exhibit 15) stated: "I don't think there is any racial discrimination here. I have seen too many people, of all races, promoted to feel there is discrimination."

"I feel this is a fair system (promotion system). I think this precludes any discrimination. It's all up to the individual to learn and work if he wants a promotion."

"I don't feel that I have been treated unfairly, nor do I feel any others in Adjudication have been treated unfairly."

H. Jerleen Anderson (Veterans Claims Clerk GS-4 (witness): "I feel discriminated against. . . . I feel I'm standing still while others, primarily whites, are progressing. I have been a GS-4 for three years and others who got their GS-4 after me are now GS-5's and GS-6's."

"I sat across from a white employee and because I was close he asked me questions he, normally, would have asked the Lead Clerk . . . He is now a GS-5."

CONCLUSION

The evidence did not support this allegation, although many black employees have definite feelings of discrimination. Suggest, whenever possible, the unsuccessful candidates be advised of the reasons for non-selection and ways to improve areas where deficiencies are noted.

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FINDINGS

Allegation No. 5—Equality in employment does not prevail here.

A. Mr. Walker (Veterans Claims Examiner, Exhibit 8) stated: "It seems to me that most minority Vietnam veterans go to Administrative Division as GS-2 or GS-3. I do not know the qualifications of the white employees (Vietnam veterans) but they seem to come into Adjudication as GS-5 Veterans Claims Examiner trainees and clerks."

"I have not seen a Black veteran hired under this new program, as a Veterans Claims Examiner, and I'm sure there are Black veterans who have adequate qualifications."

"Go down to Administrative Service and you will find it's about 95% minority people. Many of the jobs in Administration are of the lower grade levels. This I would call discrimination since it appears that minority groups are channelled to this area."

B. Mr. Pacheco (Veterans Claims Clerk, Exhibit 9) stated: "I don't feel the Mexican-Americans get promoted in Adjudication. There are only a few of us and we have worked here a long time. . . . We have not received any recent promotions."

"I feet the Mexican-American employees are taken too much for granted. We have not been 'making waves'

as the Blacks have so we tend to get overlooked on the promotional opportunities."

C. Mr. Thompson (Veterans Claims Clerk, Exhibit 4) stated: "This gives me the feeling that I am trapped in Education (Section) as a GS-6 rather than being permitted to advance. I feel I'm being used rather than being utilized."

"I have the feeling that certain white employees are 'programmed for promotion' and there is no way I can combat this. Many times white employees are not responsible for performing all of the duties a Claims Clerk should perform in the Education Section, but are permitted to specialize in some limited phase or project. This usually results in some commendatory award that provides credit toward promotion."

D. Mr. Holland (Adjudication Officer, Exhibit 2) stated: "When we hire outside, we go to the register and I do not recall interviewing any non-Caucasians. The minority people just aren't appearing on the register. I would be happy to consider any person on the register."

E. Mrs. Anderson (Veterans Claims Clerk, Exhibit 19) stated: "I am, presently, going to the University of West Los Angeles and have taken one course at Los Angeles Regional Office in compensation and pension."

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F. Frank Galvan, Jr. (Veterans Claims Examiner, Exhibit 11) stated: "I can't complain about my treatment here. I have not felt held back at all because I'm a Mexican-American."

"I can't say that there are not some Mexican-American employees who have not been treated fairly but I have not seen it."

G. Juan Leyva (Veterans Claims Clerk, Exhibit 12) stated: "I don't feel I have been discriminated against although it has been tough and the grades have not come easy. I've had to transfer and learn new jobs to become a GS-5."

"About two years ago my supervisor, . . . Mrs. Margarette Fillerup, asked me if I would like to transfer to compensation and pension to learn additional skills that would give me a better chance for promotion. I told her since I didn't plan to work much longer that I preferred to stay where I was as I liked my job."

H. Mrs. May (Veterans Claims Examiner, Exhibit 14) stated: "They bring in new employees, some with law degrees, and tend to poromote them so fast. . . . I don't know how these new people can be expected to learn all the procedures so fast to warrant these rather quick promotions."

I. Mr. Howard Hockenberry (Personnel Management Specialist, Exhibit 18) stated: "When we recruit outside, for Veterans Claims Examiners, we must use the FSEE register. It is somewhat true that there does not seem to be minority candidates available on the register. However, in order to overcome this, we have established a GS-3 Veterans Claims Clerk position as a career-promotional ladder to GS-4 and GS-5 grades. This is to endeavor to get people who are not on the FSEE register for Veterans Claims Examiners."

"We, definitely, attempt to achieve a balance between hiring new people for the Veterans Claims Examiner area and providing promotional opportunities for people presently working here at lower clerical grades."

"We, definitely, are not channeling the minority group to the low grades in the Administrative Division and the white candidates to the higher grades in Adjudication. The major portion of the recruiting on the outside is at the GS-5 level and we must utilize the people who are on the FSEE register. So if only white candidates are on the register, we must hire what is on the register. We have no control over the lack of balance of the ethnic groups on the register."

"It is not true that a Black employee, with a law degree, Mr. William O. Hall, Jr., was hired at Los Angeles Regional Office as a GS-2. Perhaps prior to receiving his records and unaware of his degree, he

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was told that the only available positions were of the GS-2 grade. I don't know. Mr. Hall received his law degree in 1962. He entered Federal employment as a Nursing Assistant GS-2 in 1963 in Alabama. He resigned in 1964, accepted a temporary GS-2 appointment with Internal Revenue Service in 1965. He came to Los Angeles Regional Office in 1967 as a GS-9 Veterans Claims Examiner and has since been promoted to his present GS-12 grade."

Mr. Don Baker, a Black employee who scored well on the FSEE, is working as a GS-3. "Mr. Baker was counselled on hiring that the only positions available at that time were GS-2's but, upon achieving permanent status, he could file for posted promotions. He was not displeased and accepted the appointment."

CONCLUSION

There is a feeling of discrimination among the Blacks regarding promotions. Other areas such as workload distribution, leave administration, overtime, etc., seem to be relatively problem-free.

This investigation did not uncover any overt discrimination toward Blacks, however, the feeling of discriminatory procedural practices is definitely present.

The need for improved supervisory communications with the staff, particularly at the lower levels, is very much indicated.

Bridging the gap from the Clerk level to the Examiner (trainee) level seems to be a critical area. Programs to help train current minority staff for promotional opportunities should be given additional emphasis.

Steps to get minority people on the FSEE register appear to be much needed.

The need for a young black counselor in the Personnel Division is indicated, to provide identity and positive communcation between the large minority staff and the Personnel Division.

GENERAL CONCLUSIONS

There is a feeling of dissatisfaction among many minority employees. In a large Division such as this, it is difficult to establish understanding of the "whys" of management decisions but this must be done.

There is a definite need for all staff to gain insight into how promotions are made and why. Perhaps the involvement of lower grade employees on the interview panels would accomplish this, in part.

The growing need for public relations and orientation and training of several officers, veterans and schools, perhaps, indicates the need for establishing a position in Adjudication, with grade consideration, to provide more active and competent leadership in this area.

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2. Testimony of Mr. Martin C. Holland, GS-15, Adjudication Officer (alleged discriminating official).
3. Testimony of Mr. Dominic E. Ballanti, Rating Board Section Chief GS-13, Adjudication Division (witness).
4. Testimony of Mr. Milton Thompson, Veterans Claims Lead Clerk GS-6 (witness).
5. Testimony of Mrs. Earline L. Evans, Veterans Claims Clerk GS-5 (witness).
6. Testimony of Mrs. Harriett K. Jones, Veterans Claims Examiner GS-9 (witness).
7. Testimony of Mr. Ira W. Claiborne, Rating Board Specialist GS-12, Adjudication Division (witness).
8. Testimony of Mr. John C. Walker, Veterans Claims Examiner GS-11 (witness).
9. Testimony of Mr. Manuel Pacheco, Veterans Claims Clerk GS-5 (witness).
10. Testimony of Miss Alberta Franklin, Veterans Claims Examiner (trainee) GS-7 (witness).
11. Testimony of Mr. Frank Galvan, Jr., Veterans Claims Examiner GS-9 (witness).
12. Testimony of Mr. Juan A. Leyva, Veterans Claims Clerk GS-5 (witness).
13. Testimony of Margarette M. Fillerup, Section Chief, Adjudication Division, GS-13 (witness).
14. Testimony of Mrs. Lillian B. May, Veterans Claims Examiner GS-9 (witness).

15. Testimony of Mr. Jack Feurstein, Veterans Claims Examiner GS-9 (witness).
16. Testimony of Mr. Robert G. Crawford, Veterans Claims Examiner GS-12 (witness).
17. Testimony of Mrs. Catherine M. Weden, Section Chief GS-13, Adjudication Division (witness).

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18. Testimony of Mr. Howard E. Hockenberry, Personnel Management Specialist GS-12, Personnel Division (witness).
19. Testimony of Jerleen Anderson, Veterans Claims Clerk GS-4 (witness).
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24. Job Performance Requirements—Section Chief-Authorization GS-13.
25. Adjudication Division Staff Breakdown by Race, Sex and Grade, dated 10/13/72.
26. Promotional Announcement No. 80-72—Supervising Veterans Claims Examiner (Section Chief) GS-13.
27. Promotion Plan—dated March 2, 1972.
28. Ground Rules for Promotional Announcement No. 80-72.
29. Sick Leave Balance Verification, dated October 13, 1972.

30. L.A.R.O. Promotion Lists for June, July, August, 1972.

31. Recommendation, Justification and Notification of High Quality Increase for Jewell D. Chandler, dated 8/31/70.

32. Letter of Commendation, dated July 13, 1971, from Field Director, Area 4.

33. Letter to Director and Director's reply from and to Federal Women's Program Coordinator (Mrs. Chandler).

34. C.S.V. Form 894—Complaint of Discrimination, dated 9/25/72.

35. E.E.O. Counselor's Report.

36. Request for Investigation from Sepulveda VA Hospital.

37. Letter of Complaint to Senator Cranston from Mrs. Earline Evans (witness).

Supreme Court, U. S.
FILED
AUG 12 1975
MICHAEL RODAK, JR., CLERK

No. 74-1599

In the Supreme Court of the United States

OCTOBER TERM, 1975

JEWELL D. CHANDLER, PETITIONER

v.

RICHARD L. ROUDEBUSH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

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JEWELL D. CHANDLER, PETITIONER

v.

RICHARD L. ROUDEBUSH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The question presented by the petition is whether, under Section 717(c) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III) 2000e-16(c), a federal employee who brings a civil action alleging unlawful employment discrimination is entitled to a plenary trial *de novo* in the district court rather than a review of the administrative record. The court of appeals in this case upheld the district court's refusal to conduct a trial *de novo* on petitioner's discrimination claims, because "[t]here was nothing before the district court to indicate that a useful purpose would be served by having a trial de novo" (Pet. App. 40a). The court of appeals held (*id.* at 41a):

> Where the administrative record affirmatively shows, as it did here, that the challenged personnel action was based upon nondiscriminatory reasons; and where, as here, the record on its face appears to be the product of a fair and impartial hearing; and where, as here, the appellant fails to point out a prejudicial defect in procedure or evidentiary deficits that should be remedied in court, the district court commits no error in deciding the case on the administrative record.

Although we believe that the judgment of the court of appeals is correct, we do not oppose the granting of the petition for a writ of certiorari. The Ninth Circuit's decision in this case conflicts with the Third Circuit's decision in *Sperling* v. *United States,* 515 F.2d 465 (reproduced at Pet. App. 42a-81a), which held that "the statutory language of the Act, as well as its legislative history, indicates a right to a trial *de novo* in the district court when suit is brought by an aggrieved federal employee pursuant to §717(c)" (*id.* at 74a).

Sperling also conflicts with the Tenth Circuit's decision in *Salone* v. *United States,* 511 F.2d 902 (reproduced at Pet. App. 82a-86a), pending on petition for a writ of certiorari, No. 74-1600. The court of appeals in *Salone* held that "the procedure [for handling federal employment discrimination complaints under Section 717(c)] should be consistent with those under 5 U.S.C. §701 et seq." and that "a de novo hearing is not here required" (Pet. App. 85a).

The conflict should be resolved by this Court. The *de novo* trial issue is of substantial practical importance to the administration of the 1972 amendments to Title VII. Its resolution will determine the proper role of the courts in the many federal employment discrimination suits brought under Section 717(c).[1]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[1]The Civil Service Service Commission informs us that they have participated in the defense of over 200 federal employee Title VII cases in the district courts in fiscal year 1975 alone.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1599

JEWELL D. CHANDLER, *Petitioner,*

v.

RICHARD L. ROUDEBUSH, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1599

JEWELL D. CHANDLER, *Petitioner,*

v.

RICHARD L. ROUDEBUSH, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 515 F.2d 251, and is reproduced in the appendix to the petition for certiorari (Pet. App. 34a-41a).

The opinion of the district court is not officially reported. It is unofficially reported at 7 [CCH] EPD ¶ 9139, and at 7[BNA] F. E. P. Cases 266. The district court's opinion is reproduced in the appendix to the petition for certiorari (Pet. App. 30a-33a).

Also reproduced in the appendix to the petition are the findings and recommended decision of the

hearing examiner (Pet. App. 1a-17a), the decision of the Veterans Administration (Pet. App. 18a-21a), and the decision of the Civil Service Commission (Pet. App. 21a-29a).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975. The petition for certiorari was filed on June 19, 1975 and granted on October 6, 1975. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether petitioner, who alleged unlawful discrimination in employment by a federal agency in a suit under the 1972 amendments to Title VII of the Civil Rights Act of 1964, was entitled to plenary judicial proceedings in the district court, as opposed to a review of the administrative record?

STATUTE INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, provides in pertinent part as follows:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the

> District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.
>
> • • •
>
> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) the provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.
>
> • • •

STATEMENT

Petitioner, Jewell D. Chandler, is a black female employee of the Veterans Administration. In 1972 Ms. Chandler applied for a GS-13 Supervisory Claims Examiner (Section Chief) position in the Division

of the Los Angeles Region in which she was employed. As of October 1972, there were 16 positions above the GS-12 level in that Division, of which two were held by white females, and fourteen were held by non-black males. Of all Division employees, 38 percent were female and 25 percent were black. (A.R. 18-19; Pet. App. 3a-4a).[1]

Petitioner was designated as "highly qualified" for the position in question, and was referred, with other candidates, to the selecting official for his consideration. A non-black male was selected for the position. (A.R. 19-21; Pet. App. 4a-5a).

Petitioner then filed a timely administrative complaint pursuant to 42 U.S.C. § 2000e-16(a) and 5 C.F.R. § 713.214, alleging, *inter alia,* that her non-selection for the position in question was due to unlawful discrimination on the basis of her race (black) and sex (female). (A.R. 269-276). Petitioner subsequently requested a hearing on her complaint.[2] An administrative

[1] Pursuant to Rule 36(4), the deferred appendix procedure is being utilized in this case. (Stipulation, Oct. 21, 1975). Citations herein are to the original record.

The record consists of four separately paginated volumes plus one paginated exhibit volume. Volume 1 contains the pleadings, orders, etc., in the district court and the court of appeals, and is cited as 'R. ——'. Volumes 2-4 consist of the transcripts of three motion hearings in the district court, and are cited as, *e.g.*, 'Tr. ——, Oct. 29, 1973'.

The certified administrative record of proceedings before the Veterans Administration and the Civil Service Commission constitutes the exhibit volume, and is cited as 'A.R. ——'. This exhibit was part of the record before the lower courts. (R. 121-2).

Portions of the record which are reproduced in the appendix to the petition for certiorari are also cited as 'Pet. App. ——'.

[2] Such a hearing is not required, but is available at the complainant's option. 5 C.F.R. § 713.217(b).

hearing was accordingly held, at which Ms. Chandler, who is not an attorney, represented herself. The hearing examiner refused to call 15 of the 24 witnesses whom petitioner had requested, including the individual who had been selected over petitioner for the job in question. (A.R. 118, 140-145). After the hearing, the examiner submitted findings and recommendations pursuant to 5 C.F.R. § 713.218(g), to the effect that petitioner had not been discriminated against on the basis of her race with respect to the non-selection in question, but that she *had* been discriminated against on the basis of her sex. In light of the finding of sex discrimination, the examiner recommended that petitioner be promoted immediately and retroactively to the position in question. (A.R. 16-35; Pet. App. 1a-17a).

Upon receipt of the hearing examiner's findings and recommended decision, a final decision was issued by the Veterans Administration. This decision rejected the examiner's finding of sex discrimination, accepted the finding of no race discrimination, and accordingly granted no relief. (A.R. 36-9; Pet. App. 18a-21a). Petitioner then filed a timely appeal to the Civil Service Commission. (A.R. 13-15).[3] The Commission affirmed the Veterans Administration's decision. (A. R. 3-8; Pet. App. 21a-29a). Petitioner then filed this suit pursuant to subsection 717(c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c). (R. 1-7).

[3] Such an appeal is not required, but is available at the complainant's option. 5 C.F.R. §§ 713.221(d), 713.231(a).

In the district court, petitioner first moved for summary judgment on the ground that the official who entered the Veterans Administration decision rejecting the hearing examiner's decision in petitioner's favor was, as a technical matter of delegation of authority, without authority to act in the matter. (R. 17-30). This motion was denied. (R. 143-4). Petitioner then promptly initiated discovery, filing notice of two depositions and a request for production of documents. (R. 146-150). The respondents moved for a protective order prohibiting the discovery, on the ground that discovery was impermissible because the judicial proceedings should be limited to a review of the administrative record. (R. 151-7). Petitioner opposed the motion for a protective order, asserting her right to discovery and to a plenary judicial trial *de novo*. (R. 158-171).

In order to avoid deciding the issues presented in a piecemeal fashion, the district court determined that it would hold the question of discovery in abeyance pending (1) the filing of cross-motions for summary judgment on the basis of the administrative record, and (2) a determination by the court of the proper scope of the judicial proceedings. (Tr. 3-10, Nov. 26, 1973). Pursuant to the court's request, the parties then filed cross-motions for summary judgment on the basis of the administrative record. (R. 172-180; R. 181-194). It was clearly understood by the parties and the district court that petitioner's cross-motion for summary judgment was filed without prejudice to her position that she had a right to discovery and a trial *de novo*. (Tr. 3-10, Nov. 26, 1973).

After the cross-motions for summary judgment were filed, the district court granted respondents' mo-

tion for summary judgment on the basis of the administrative record, without any pre-trial discovery and without any judicial evidentiary proceedings. The district court adopted the legal position of *Hackley* v. *Johnson,* 360 F.Supp. 1247 (D.D.C. 1973), *rev'd sub nom Hackley* v. *Roudebush,* 520 F.2d 108 (D.C. Cir. 1975), concerning the nature and scope of judicial proceedings in Title VII cases against federal defendants. It then found "that the absence of discrimination is firmly established by the clear weight of the administrative record and hence plaintiff is not entitled to any relief." Apart from thus paraphasing the *Hackley* district court's standard for granting summary judgment in the government's favor on the basis of the administrative record, the opinion of the district court in the case at bar did not explain or state any reasons for its finding against petitioner. (R. 252-9; Pet. App. 30a-33a).

The court of appeals affirmed the district court's denial of petitioner's motion for summary judgment on the ground of improper delegation of reviewing authority, and affirmed the district court's denial of petitioner's cross-motion for summary judgment on the administrative record. (515 F.2d at 253-4; Pet. App. 36a-38a). The petition for certiorari did not seek review of these holdings. (Pet. 6).

The court of appeals also affirmed the district court's grant of summary judgment in respondents' favor on the basis of the administrative record and its denial of a plenary judicial trial *de novo*. (515 F.2d at 254-5; Pet. App. 38a-41a). This is the issue on which certiorari was sought and granted. (Pet. 6). The court of appeals held that the district court correctly "adopted and applied the intermediate scope of in-

quiry expounded in *Hackley* v. *Johnson* [*supra*]," and that summary judgment in the government's favor was appropriate on the basis of the administrative record. (515 F.2d at 254-5; Pet. App. 38a-41a). In ruling that petitioner was not entitled to a trial *de novo* as a matter of right, the court of appeals held that a federal sector Title VII plaintiff must make a showing of necessity in his or her particular case before supplementation of the administrative record or a trial *de novo* is considered. The court then concluded that petitioner had not made such a showing of necessity. (515 F.2d at 255; Pet. App. 40a-41a).[4]

SUMMARY OF ARGUMENT

Civil actions under Title VII against federal government defendants should be adjudicated pursuant to the same procedures that are utilized in all other civil actions under Title VII. These procedures include discovery pursuant to the Federal Rules of Civil Procedure, and a plenary judicial trial. The courts below followed an erroneous procedure in granting summary judgment against petitioner pursuant to a review of the administrative record.

A. It is settled that Title VII actions against private sector defendants are plenary judicial proceed-

[4] This conclusion by the court of appeals ignored the fact that petitioner had attempted to conduct discovery and had presented reasons why the discovery requested was necessary. In addition, while the court of appeals' opinion implies that petitioner was somehow remiss in her obligation to apprise the district court of the reasons why supplementation of the record or a trial *de novo* was necessary, in fact petitioner made her position and the reasons for it quite clear, and the procedure by which the issues were presented to the district court was the procedure which the district court itself requested. (R. 146-150, 158-171; Tr. 3-10, Nov. 26, 1973).

ings, and that prior administrative or arbitral determinations cannot override the plaintiff's right to a plenary judicial trial. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). The question in this case, therefore, is whether a double standard is to be applied which places the federal government in a favored position in comparison to other Title VII defendants. Such a double standard would be incompatible with the central purpose of the 1972 amendments extending Title VII's coverage to the federal sector. That purpose was to place federal employees and applicants on a par with employees and applicants in the private sector. *Morton* v. *Mancari,* 417 U.S. 535, 546-7 (1974).

Unless plenary judicial proceedings are provided in federal sector Title VII cases, the effectiveness of the 1972 amendments will be drastically impaired. The substantive Title VII law developed in private sector cases is now to be applied to the federal government. *Morton* v. *Mancari, supra,* 417 U.S. at 547. Plenary judicial proceedings are essential to the accomplishment of this objective, because under Title VII the forum of trial "inevitably affects the scope of the substantive right to be vindicated." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56. The reasoning of the Court in the *Alexander* case is fully applicable by analogy in the case at bar.

B. 1. The plain language of amended Title VII provides for the same plenary judicial proceedings in federal sector cases as in all other cases. The statutory structure is unitary and interrelated; the section of the statute which creates and describes a civil action in

the federal sector is expressly cross-referenced to the provisions which govern private sector cases. It is settled that those latter provisions require plenary judicial proceedings.

2. Petitioner's analysis of the statutory language is buttressed by a review of the various stages in the administrative enforcement procedure at which a civil action may be filed. In some of the circumstances where the judicial process may be invoked, such as when no administrative record has been timely compiled, plenary judicial proceedings are obviously required. Yet the statute in no way distinguishes this circumstance from others. Nor does the statute distinguish cases in which an administrative evidentiary hearing has been held from those in which there has been no such hearing. Since no distinctions are made between significantly different circumstances, the judicial procedures contemplated must be the same in all cases, namely, those which are available in any plenary civil action. Moreover, since no explicit restriction on the judicial process is stated in the statute, the process is impliedly unrestricted. The courts may not engraft restrictions onto Title VII which the statute itself does not impose. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 798-9.

C. The legislative history of amended Title VII compels the conclusion that federal sector cases are to be adjudicated in the same manner as all other cases. The purpose of the 1972 amendments was to grant the same treatment in the courts to all Title VII litigants, in the private sector, the state and local government sector, and the federal sector.

1. The federal sector 1972 amendments were intended to rectify a situation in which enforcement of equal employment opportunity in the federal government was dependent upon an administrative procedure that had impeded rather than advanced the goal of eliminating discrimination. The congressionally mandated recourse for the federal sector complainant who is dissatisfied with the result obtained in the administrative process is a plenary civil action in district court. Some of the draft legislation considered in the 92d Congress provided for an administrative cease and desist procedure and court of appeals review on the administrative record in the private sector, and this was a major source of controversy. However, in these drafts, which also extended Title VII's coverage to the federal government, federal sector cases were always governed by the section of the proposed statute providing for a civil action in district court; they were never governed by the section providing for a review on the record in the court of appeals. In the statute as enacted, cease and desist and court of appeals review were dropped in the private sector, and all cases were governed by the plenary civil action provisions that governed federal sector cases in the antecedent draft legislation.

2. The unitary structure of the finally enacted legislation fully implements the basic congressional purpose with respect to the federal sector: to provide the same rights and remedies to federal employees and applicants as were provided in the private sector. The authoritative statements of legislative intent emphasize the concept of equality of treatment in all sectors of the economy, and among all plaintiffs and all defendants. The relevant House and Senate Committee

reports, and numerous statements of Senator Dominick (who played a pivotal role in the evolution of the statute as enacted), are especially authoritative. The controversy over certain remarks of Senator Cranston and Senator Williams is not of controlling significance in view of the clear thrust of the legislative history taken as a whole.

3. The congressional intent to afford plenary judicial proceedings in federal sector cases is in no way inconsistent with the simultaneous determination to retain the Civil Service Commission, rather than the Equal Employment Opportunity Commission, as the administrative agency with authority in the federal sector. The federal sector civil action in district court was intended to provide a judicial check on the pro-defendant bias of the CSC, just as the private sector civil action would provide a judicial check on the pro-plaintiff bias of the EEOC. In both sectors, the district court's authority is exerted through a *de novo* judicial proceeding. The plenary civil action in the federal sector is also consistent with the purpose of maintaining the mechanism for possible internal complaint resolution and possible agency self-correction which the administrative procedure provides.

D. The decisions of the lower courts which have considered the issue in the case at bar fall into three basic categories. The Third, Seventh and District of Columbia Circuits have ruled in favor of petitioner's position that federal sector Title VII cases are to be conducted as plenary judicial proceedings. The Tenth Circuit has held that the judicial function in federal sector Title VII cases is strictly limited to a review of the administrative record pursuant to a

"substantial evidence" standard. The Eighth and Ninth Circuits have adopted a hybrid approach, pursuant to which the plaintiff must make a showing of necessity to justify any effort to go beyond the administrative record. The decisions of the courts which have held in favor of plenary judicial proceedings are far more persuasively reasoned than the decisions to the contrary. *Hackley* v. *Roudebush,* 520 F.2d 108 (D.C. Cir. 1975); *Sperling* v. *United States,* 515 F.2d 465 (3rd Cir. 1975), *pet. for cert. pending,* No. 75-247; *Caro* v. *Schultz,* 521 F.2d 1084 (7th Cir. 1975).

E. The only rule which is consistent with the language and legislative history of the 1972 amendments is one which provides for plenary judicial proceedings. This case does not present a policy issue for the Court's review, because the policy decision has already been made by Congress. But even if this were not so, sound policy considerations would also counsel in favor of the rule which petitioner advocates.

Any rule which fails to recognize the right to plenary judicial proceedings would drastically impair the effectiveness of the 1972 amendments by making judicial deference to agency and CSC decisions the easy path of least resistance. Moreover, federal sector plaintiffs would be placed at a unique and wholly unjustified disadvantage if they were required to make an affirmative showing persuading the district court that there is a "need" before they could exercise procedures routinely accorded to other civil litigants.

A double standard providing for a restrictive approach only in federal sector cases is not justified by considerations of judicial economy. Whatever view one takes as to the efficacy of the CSC-designed adminis-

trative process, it is not—and is not intended to be—either the equivalent or an approximation of an adversary judicial proceeding. Title VII's judicial remedy would be of dubious value if it did not include the right to conduct discovery and have the court evaluate the credibility of witnesses by observing their testimony.

In federal sector Title VII cases as in any civil litigation, the district courts may take informal steps to avoid unnecessary duplication of evidence which is already of record. The administrative record is admissible in the district court, subject to the limitations of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. But it is admissible only for whatever light it, as one item of evidence, sheds on the facts at issue. It cannot justly be utilized as a weapon for limiting the scope of otherwise proper discovery or for impairing the plaintiff's access to the normal mechanisms of judicial factfinding. To focus the attention of the parties and the court on the administrative record by limiting the scope of judicial proceedings would have the same stultifying effect as a regime of "deferral", which this Court has specifically rejected in the private sector. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 55-9.

F. The issue in the case at bar has important implications for other issues. Foremost among these is the question of the availability of class actions in federal sector cases. Any rule providing for less than plenary judicial proceedings would raise very serious questions as to the applicability of private sector class action law in the federal sector. Such a result would be inconsistent with Title VII's broad remedial pur-

pose, and contrary to the express will of Congress. *See, Albemarle Paper Co.* v. *Moody,* 95 S.Ct. 2362, 2370 n.8 (1975).

G. In the case at bar, petitioner was deprived of the right to conduct any discovery and the right to present any testimonial evidence to the district court as trier of fact. A reversal of the judgment below follows as a matter of course if petitioner had the right to plenary judicial proceedings. Moreover, even if the Court were to adopt an approach requiring a showing of necessity to go beyond the administrative record, the judgment in the case at bar should still be reversed. The courts below ignored crucial deficiencies in the administrative record in holding that there was no need for discovery and judicial evidentiary proceedings in the case at bar.

ARGUMENT

I.

PETITIONER WAS ENTITLED TO HAVE THIS TITLE VII ACTION AGAINST FEDERAL AGENCY DEFENDANTS ADJUDICATED PURSUANT TO THE SAME PROCEDURES, INCLUDING DISCOVERY AND A PLENARY JUDICIAL TRIAL, AS ARE APPLICABLE TO TITLE VII ACTIONS AGAINST ALL OTHER KINDS OF DEFENDANTS; AND THE COURTS BELOW ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS PURSUANT TO A REVIEW OF THE ADMINISTRATIVE RECORD.

A. In Context the Issue Is Whether the 1972 Amendments to Title VII Are to Be Impaired by the Application of a Double Standard Favoring Federal Defendants Over All Other Defendants.

If the defendant in the case at bar were a private company rather than a federal agency, and the court of appeals had held that plenary judicial proceedings were not a matter of right and that the district court could, in its discretion, simply review the record of administrative or arbitral proceedings, then the decision below would be plainly inconsistent with the decisions of this Court. For it is settled that Title VII actions against private sector defendants are *de novo* judicial proceedings, and that prior administrative or arbitral determinations cannot override the plaintiff's right to a plenary judicial trial. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). Under the 1972 extension of Title VII's coverage, this is clearly the law not only with respect to private companies, unions and employment agencies, but with respect to state, county, and municipal governments as well.[5]

This case therefore raises the fundamental question of whether the federal government is to be subjected

[5] *See,* 42 U.S.C. §§2000e(a), 2000e-5(f)-(k).

to different and less demanding legal standards and procedures under Title VII than those to which all other classes of defendants are subjected. It seems obvious that a legislative intention to enshrine such a double standard could be inferred only from the most compelling evidence. *Compare, Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 89-91 (1973). As is shown in Arguments I(B) and I(C), *infra,* the language and legislative history of the 1972 amendments provide no support for any such inference. On the contrary, the central purpose of the federal sector 1972 amendments was to place federal employees and applicants on a par with employees and applicants in the private sector. *Morton* v. *Mancari,* 417 U.S. 535, 546-7 (1974). This purpose was informed by the ideal of fundamental fairness in the exercise of the power and authority of the federal government. "Equality is the touchstone of a democratic government, and Congress in 1972 finally perceived the injustice and hypocrisy of a system that demanded more from private employers than it was willing to give itself. . . ." *Hackley* v. *Roudebush,* 520 F.2d 108, 136 (D.C. Cir. 1975).

The effectiveness of the 1972 federal sector amendments largely depends upon the proper resolution of the issue which this case presents. As this Court has recognized, in Title VII actions the forum of trial "inevitably affects the scope of the substantive right to be vindicated." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 56. For that reason, the following recent statements by the Court provide substantial guidance on the issue here presented, even though they are addressed to the question of substantive legal standards rather than to any question of procedure:

". . . the mechanism for enforcing longstanding Executive Orders forbidding Government discrimination had proved ineffective for the most part. [Footnote omitted.] In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and proscribed discrimination in most areas of federal employment. [Citation omitted.] In general, it may be said that *the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government.* As stated in the House Report,

" 'To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. *The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly. . . .*' H.R. Rep. No. 92-238, on H.R. 1746, pp. 24-25 (1971)." *Morton* v. *Mancari, supra,* 417 U.S. at 546-7 (emphasis added).

In addition, the following language of this Court's opinion in *Alexander* v. *Gardner-Denver Co., supra,* is in substantial part applicable by analogy to federal sector Title VII actions such as the case at bar:

"[Title VII] does, however, vest federal courts with plenary power to enforce the statutory requirements. . . .

* * *

". . . legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Title VII provides for consideration of employment-discrimination claims in several forums. [Citations omitted.] And, in general, submission of a claim to one forum does not preclude a later submission to another.

* * *

"The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions [here substitute 'federal agency or Civil Service Commission decisions'] would be inconsistent with that goal. Furthermore, we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'

* * *

". . . the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

* * *

". . . a [deferral] standard that adequately insured effectuation of Title VII rights in the arbitral [here substitute 'administrative'] forum would tend to make arbitration [here substitute 'the administrative process'] a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make *de novo* determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights.

* * *

"The federal court should consider the employee's claim *de novo.* The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." 415 U.S. at 47-8, 56-7, 59-60 (footnotes omitted).

The procedural issue presented in the case at bar should be considered in the context of the established general principles set forth above. The substantive law

developed in private sector Title VII cases is now fully applicable in the federal sector. The procedures followed in adjudicating federal sector cases must, therefore, be attuned to the full effectuation of the substantive rights which are involved. There is no justification for applying a double standard under Title VII and favoring federal agency defendants over all other types of defendants. The anomaly of such a double standard is especially striking in the present context, where the government opposes plenary judicial trials in federal sector Title VII cases, while the Solicitor General has successfully argued to this Court that a private sector plaintiff must receive a plenary judicial trial *de novo* regardless of prior adverse administrative and arbitral determinations.[6]

The decision below sanctions a procedure for adjudicating federal sector Title VII cases that is wholly at odds with the procedure that is applicable in the private sector. Yet, in the federal sector no less than in the private sector, it cannot be gainsaid that "Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminary employment claims. It is the duty of the courts to assure the full availability of this forum."

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[6] Brief for the United States as Amicus Curiae, *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, October Term, 1973. Similarly, the government takes the position that class actions and class-wide relief are unavailable as a matter of law in federal sector Title VII cases (*e.g.*, Brief for Appellees, at pp. 49-64, *Swain* v. *Calloway*, 5th Cir. No. 75-2002), while the Solicitor General has successfully argued to this Court for a diametrically opposite result in the private sector (Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae, at pp. 17-33, *Albemarle Paper Co.* v. *Moody*, Nos. 74-389, 74-428, October Term, 1974).

Alexander v. *Gardner-Denver Co., supra,* 415 U.S. at 60 n.21.

B. The Express Language of Amended Title VII Provides for the Same Plenary Judicial Proceedings in Federal Sector Cases As in All Other Cases.

Prior to March 24, 1972, Title VII of the Civil Rights Act of 1964 did not provide for suits against federal government defendants. Title VII as amended by the Equal Employment Opportunity Act of 1972 now provides a right to file a civil action against federal sector defendants, and explicitly states that the civil action is governed by the same judicial procedures as those which control civil actions against private sector and state and local government defendants. This statutory language and structure is of crucial importance to the issue presented in the case at bar.

1. The Unitary and Interrelated Statutory Structure

The portion of amended Title VII which creates and describes a right to sue federal government defendants —subsection 717(c), 42 U.S.C. § 2000e-16(c)—provides that at certain specified stages in the administrative enforcement procedure (to be discussed *infra*), a complainant

> ". . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706. . . ."

Section 706 is the portion of Title VII which details the procedures to be followed in civil actions against private sector (and state and local government) defendants. In addition, subsection 717(d) of Title VII,

42 U.S.C. § 2000e-16(d), which further describes the judicial procedures that are to control civil actions brought against federal agencies, reads as follows:

> "The provisions of section 706(f) through (k), as applicable, shall govern actions brought hereunder."

As will now be shown, a review of the portions of the statute to which subsections 717(c) and 717(d) are specifically cross-referenced—subsections 706(f) through (k)—provides compelling support for the conclusion that civil actions against federal government defendants are to proceed in the same manner as civil actions against all other kinds of defendants, and are to include a plenary judicial trial of the plaintiff's allegations. All three courts of appeals which have embarked upon a reasoned analysis of the statutory language have arrived at this conclusion. *Sperling* v. *United States,* 515 F.2d 465, 474-7 (3rd Cir. 1975), *pet for cert. pending,* No. 75-247; *Caro* v. *Schultz,* 521 F.2d 1084, 1087-8 (7th Cir. 1975); *Hackley* v. *Roudebush,* 520 F.2d 108, 118-122 (D.C. Cir. 1975). The Third Circuit has justly observed that the statutory language "hardly admits of any other interpretation." *Sperling* v. *United States, supra,* 515 F.2d at 475.

Subsection 706(f)(3), 42 U.S.C. § 2000e-5(f)(3), provides for district court jurisdiction of "actions brought under this title." Subsection 706(f)(4), 42 U.S.C. § 2000e-5(f)(4), provides that when such an action is filed

> "It shall be the duty of the chief judge of the district . . . in which the case is pending immediately to designate a judge in such district *to hear and determine the case.* In the event that no judge in the district is available *to hear and determine the case,* the chief judge . . . shall certify this fact to the chief judge of the circuit . . . who shall then designate a district judge or circuit judge of the circuit *to hear and determine the case.*" (Emphasis added.)

Subsection 706(f)(5), 42 U.S.C. § 2000e-5(f)(5), goes on to provide that

> "It shall be the duty of the judge designated pursuant to this subsection to *assign the case for hearing* at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not *scheduled the case for trial* within one hundred and twenty days after issue has been joined, that judge *may appoint a master* . . . ." (Emphasis added.)

Subsection 706(g), 42 U.S.C. § 2000e-5(g), which authorizes the awarding of certain types of relief, provides that

> "*If the court finds* that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent . . . and order such affirmative action as may be appropriate . . . ." (Emphasis added.)

Subsection 706(j), 42 U.S.C. § 2000e-5(j), makes the district court's disposition of the action appealable to the appropriate court of appeals under 28 U.S.C. §§ 1291, 1292. And finally, subsection 706(k), 42 U.S.C. § 2000e-5(k), provides that

> "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and *the United States*

shall be liable for costs the same as a private person." (Emphasis added.)

The language of these sections—which, under subsection 717(d), "shall govern" federal sector civil actions—clearly indicates that the plaintiff in a Title VII action against a federal agency is generally entitled to a plenary judicial proceeding, including discovery and a full evidentiary hearing, regardless of the status of the administrative record. This is, of course, the law with respect to Title VII actions against private sector defendants, which are *de novo* proceedings, regardless of the scope or outcome of prior administrative or arbitral proceedings. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Garnder-Denver Co.,* 415 U.S. 36 (1974).[7]

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[7] It is true, of course, that subsection 717(d) says that subsections 706(f) through (k) 'shall govern "as applicable." But as a review of these subsections makes clear, that phrase merely covers the fact that portions of certain subsections such as those dealing with the Equal Employment Opportunity Commission (EEOC) and the Attorney General—*e.g.,* subsections 706(f)(1), 706(i), 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(i)—are obviously not applicable to actions against the federal government. To read more than this into the phrase "as applicable" would render subsection 717(d) meaningless.

While the government has in the past placed great reliance on the phrase "as applicable" in relation to the present issue, this does not alter the fact that such reliance is, for the reason just stated, wholly lacking in plausibility. For an extended discussion of the "as applicable" argument which the government has advanced in the past, *see, Hackley* v. *Roudebush, supra,* 520 F.2d at 119-122; *see also, id.,* 520 F.2d at 170 (Leventhal, J., concurring).

It is relevant here to note that for more than three years after the effective date of the 1972 amendments, the government took the position that the amendments do not authorize recovery of attorneys' fees by successful plaintiffs in federal sector Title VII cases. This position was based on the "as applicable" argument. The government has, however, now abandoned this position, and has acknowledged that subsection 706(k) is applicable in civil actions under subsection 717(c). This change of position was explained in part as follows: "The application of § 2000e-5(k) to the 1972 amendments requires inferences and implications to be drawn to confer upon it the specificity that the law requires. At the same time, however, I recognize that unless such clearly intended inferences be drawn, the inclusion of subsection 5(k) within the ambit of § 2000e-16(d), might render such inclusion without purpose or effect. These considerations have weighed heavily in my decision." Letter from Acting Assistant Attorney General Irving Jaffe to Senator John V. Tunney, May 6, 1975, published in CCH *Employment Practices Guide,* New Developments ¶ 5327.

2. The Provision of the Same Civil Action in Significantly Different Circumstances

The foregoing analysis is further buttressed by a review of the various stages in the administrative enforcement procedure at which the statute gives the complainant the option to file a civil action. Subsection 717(c) of Title VII, 42 U.S.C. § 2000e-16(c), and the Civil Service Commission's implementing regulations, 5 C.F.R. §§ 713.201, *et seq.,* provide that an employee or applicant for employment who has filed an administrative complaint with his agency may file a civil action in federal district court in any of the following six basic circumstances:

1. if 180 days have elapsed since the filing of the administrative complaint and *the agency has not taken final action on the complaint* (whether or not a hearing has been held); 42 U.S.C. § 2000e-16(c); 5 C.F.R. § 713.281(b);
2. within 30 days of a *rejection or cancellation of the complaint;* 42 U.S.C. § 2000e-16(c); 5 C.F.R. § 713.215;
3. within 30 days of receipt of notice of *final agency action* on the complaint *without a hearing;* 42 U.S.C. § 2000e-16(c); 5 C.F.R. §§ 713.-

217(b)(3), 217(c), 221(b)(1), 221(b)(3), 281(a);

4. within 30 days of receipt of notice of *final agency action* on the complaint *following a hearing;* 42 U.S.C. §2000e-16(c); 5 C.F.R. §§713.217(b)(2), 221(b)(2), 281(a);

5. if 180 days have elapsed since the filing of an appeal from the final agency action (with or without a hearing) to the Civil Service Commission and *the Commission has not taken final action on the appeal;* 42 U.S.C. §2000e-16(c); 5 C.F.R. §§713.231(a), 281(d); or

6. within 30 days of receipt of notice of *final Civil Service Commission action on an appeal* from the final agency action (with or without a hearing); 42 U.S.C. §2000e-16(c); 5 C.F.R. §§713.-231(a), 281(c).

It should be noted that even the above categorization is in fact an oversimplification, since circumstances 1, 5 and 6 can be subdivided into two different categories depending on whether an administrative evidentiary hearing has been held; and it should be noted that in all cases the question of whether such a hearing is held is completely at the option of the complainant. 5 C.F.R. §§713.217(b), 713.221(b). It should also be noted that the scope and nature of the agency's investigation of a complainant's allegations where no administrative hearing is held is completely controlled by the agency; and that even where the complainant elects to proceed to an administrative hearing, he has no rights to discovery comparable to those provided by the Federal Rules of Civil Procedure. 5 C.F.R. §§713.216, 713.218.[8]

[8] In the case at bar, petitioner is in the procedural posture represented by the first subdivision of circumstance 6: she invoked the district court's jurisdiction after a decision by the Civil Service Commission on her appeal from a final agency decision with a hearing.

It is immediately apparent from the six-category analysis set forth above that the only statutory prerequisite to maintaining a civil action common to all of the six circumstances listed is the filing of an administrative complaint; neither an agency or CSC decision, nor an administrative hearing, is a precondition to invocation of the judicial process. The language of Section 717 gives the federal employee or applicant for employment the right to invoke the judicial process in each of circumstances 1-6 and their subdivisions. It is highly significant that the statute and the CSC regulations make absolutely no distinction between the nature of the judicial proceedings afforded in the different circumstances. In each circumstance the civil action is simply "governed" by subsections 706(f) through (k). 42 U.S.C. §2000e-16(d). Since no distinctions are made among the rights of plaintiffs who are in different circumstances, the judicial process contemplated must be the same in all cases. And since no explicit restriction on the judicial process is stated in the statute, the process is impliedly unrestricted.

In some of the circumstances enumerated anything less than a plenary judicial trial would be plainly unthinkable. For example, in circumstance 1 the plaintiff files his civil action after 180 days have elapsed with no final agency action on the initial administrative charge. It may be that the agency's investigation has not even been commenced; or there may have been an investigation but no CSC-appointed examiner's hearing; or there may have been a hearing but no examiner's findings; or there may have been a hearing

with findings but no final agency decision. In the first two cases, due process would clearly require the district court to hold an evidentiary hearing. In the third case, the absence of any findings by the officer who heard testimony would also dictate a new hearing before a judge who would make his own findings. In the fourth case there would at least be a record and findings for the judge to review. But regardless of the fact that each of these four cases could potentially arise within the confines of circumstance number 1, the statute draws no distinctions concerning the treatment to be accorded "civil actions" filed in the various cases described. Since a plenary trial is obviously required in the first three cases, it follows that it is required in the fourth and in other cases as well. Indeed, if Congress had intended that judicial proceedings under the 1972 amendments be limited to a "review of the record," it would certainly not have authorized suits in cases where there is no record to review.

As previously noted, the statute also contemplates situations other than those just described, *i.e.,* suit after final agency action, after final CSC action, and after the CSC has failed to render a decision within one hundred eighty (180) days. Each situation may or may not have involved an evidentiary hearing with findings. Yet despite the obvious differences among these situations, the statute makes no distinctions and the scope of the employee's "civil action" is not restricted under any of the various circumstances. Title VII is a remedial statute and the courts may not engraft upon it restrictions which it does not itself impose. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 798-9. It follows that the "civil action" to which a plaintiff is

entitled is, as the statutory language so clearly indicates, a plenary judicial proceeding, including presentation of the case to a district judge, who will hear and determine the case after discovery and a trial on the merits, and grant whatever relief is appropriate in light of his findings.[9]

C. The Legislative History of Amended Title VII Compels the Conclusion That Federal Sector Cases Are to Be Conducted in the Same Manner As All Other Cases.

The legislative history of the 1972 amendments to Title VII affirmatively indicates that Congress did not intend to limit the judicial function in federal sector Title VII litigation to review of an administrative record, but intended to grant federal sector plaintiffs the same rights as private sector litigants, including the right to a full evidentiary hearing in district court.

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[9] Where no administrative evidentiary hearing has been held and the administrative decision is based on an "investigative file" (5 C.F.R. § 713.216), the very term "trial *de novo*" is an obvious misnomer for the result here advocated. In such cases, a plenary judicial trial will be the first "live", non-paper proceeding to occur. It is interesting to note, therefore, that in the majority of complaints that are administratively processed, no hearing is held. U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* Vol. V, " To Eliminate Employment Discrimination" (July, 1975), at p. 76 n.257.

This is not to suggest, of course, that the term "trial *de novo*" is appropriate even where, as in the case at bar, an administrative hearing has been held. For such a hearing is by no means the equivalent of a judicial trial. *See, Hackley* v. *Roudebush, supra* 520 F.2d at 137-141. But the point here is that the statute makes no distinctions between cases where an administrative hearing has been held and those where no administrative hearing has been held; and that, ultimately, the question presented by the case at bar is controlled by considerations far broader than whether an administrative hearing has been held, or whether the administrative procedure is or is not efficaciously designed. *See, Hackley* v. *Roudebush, supra,* 520 F.2d at 169-172 (Leventhal, J., concurring).

Indeed, as will be shown *infra,* at many points in the legislative history of the 1972 amendments the draft legislation granted federal sector litigants not less, but *more* extensive judicial rights than private sector litigants, who were in certain circumstances to be limited to review in a court of appeals of an EEOC record. In the legislation as finally enacted, however, all differences in judicial procedures were eliminated, and private sector and federal sector litigants were, as shown in Argument I(B), *supra,* covered by the same civil action procedures in all circumstances. The 1972 amendments as finally enacted thus implement the clear purpose evinced by the legislative history taken as a whole: to grant the same treatment in the courts to *all* Title VII litigants, in the private sector, the state and local government sector, and the federal sector.

The Senate Committee Report on the new subsection 717(c) authoritatively states the legislative purpose behind the creation of a right of action under Title VII in the federal sector:

> "Aggrieved employees or applicants will also have *the full rights available in the courts as are granted to individuals in the private sector under Title VII.*" S. Rep. No. 92-415, 92d Cong., 1st Sess. at 16 (1971); Subcommittee on Labor, Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972,* 92d Cong., 2d Sess. (Committee Print, 1972) [hereinafter cited as *History*], at 425 (emphasis added).

This congressional equation of the rights of federal and private sector plaintiffs is crucial, since private sector plaintiffs who have met the jurisdictional pre-

requisites to maintenance of a civil action are entitled to a full evidentiary hearing in district court, regardless of the outcome of prior administrative or arbitral proceedings. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974).

In what follows, petitioner sets forth her analysis of the legislative history of the 1972 federal sector amendments. In addition, petitioner respectfully requests that the Court refer to the exhaustive analysis of the District of Columbia Circuit in *Hackley* v. *Roudebush,* 520 F.2d 108, 122-148 (D.C. Cir. 1975), where the legislative history is "set out at length in Judge Wright's opinion in order to present the full picture . . . ." *Id.,* 520 F.2d at 170 (Leventhal, J., concurring).[10] The *Hackley* opinion is worthy of the Court's attention both because it explores all details of the legislative history with meticulous care, and because it discusses the various arguments that the government has in the past advanced in support of its contrary interpretation.

1. The Evolution of the Final 1972 Legislation, and the Structure of the Other Proposals That Were Considered

Prior to the 1972 amendments, Title VII did not apply to federal employees. Congress had however previously declared it to be "the policy of the United States to insure equal employment opportunities for

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[10] The *Hackley* court unanimously endorsed Judge Wright's analysis of the legislative history. Judges Leventhal and Davis deemed it unnecessary to discuss the empirical question of the recent performance of the Civil Service Commission, and did not, therefore, join in the portion of Judge Wright's opinion which dealt with that question. *Id.,* 520 F.2d at 169-172.

Federal employees without discrimination because of race, color, religion, sex, or national origin. . . ." 5 U.S.C. § 7151. The primary responsibility for implementing this policy prior to the 1972 amendments to Title VII lay with the Civil Service Commission (CSC) under Executive Order 11246 (1965), later superseded by Executive Order 11478 (1969).

The CSC's efforts had proven to be utterly inadequate. "[T]he mechanism for enforcing longstanding Executive Orders forbidding Government discrimination had proved ineffective for the most part." *Morton* v. *Mancari,* 417 U.S. 535, 546 (1974) (footnote omitted). Minorities and women continued to be vastly underrepresented or underemployed in many federal agencies. As the House Committee on Education and Labor reported in June 1971, the CSC was responsible for a "critical defect" in the federal government's efforts to implement a policy of equal employment opportunity. The administrative process for investigating and resolving discrimination complaints—a process which was, then as now, devised and overseen by the CSC[11]—actually "impeded rather than advanced" the goal of eliminating discrimination, and

[11] Detailed CSC regulations for processing complaints of discrimination which were quite similar to the regulations now in effect were already in existence three years prior to the 1972 amendments. The regulations were expanded somewhat after the amendments, to include, for example, provisions concerning the right to sue provided by the amendments, clarifying the authority to award certain types of relief, and allowing third party allegations (but recognizing no right to sue on the basis of such allegations). In most other respects, the regulations are basically unchanged. *Compare* 5 C.F.R. Part 713, 34 Fed. Reg. 5367 (Mar. 19, 1969), as amended at 34 Fed. Reg. 14023 (Sept. 4, 1969) *with* 5 C.F.R. Part 713, 37 Fed. Reg. 25669 (Dec. 2, 1972). *See also, Hackley* v. *Roudebush, supra,* 520 F.2d at 137-142.

led to "a general lack of confidence in the effectiveness of the complaint procedure on the part of Federal employees."[12] Under the CSC regulations—then as now—the supposedly independent hearing examiner's findings and decision on a discrimination complaint were merely recommendations to the offending agency, which in turn would render the final decision itself. Thus, the agency acted as both defendant and judge.[13]

Successful appeals to the CSC's Board of Appeals and Review were understandably rare.[14] The House Committee found that

> ". . . the Civil Service Commission has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination which exist in the system. . . . The Civil Service Commission seems to assume that employment discrimination is primarily a problem of malicious intent on the part of individuals. It apparently has not recognized that the general rules and procedures it has promulgated may actually operate to the disadvantage of minorities and women in systemic fashion." *House Report* at 24; *History* at 84.

Lack of expertise was not the only explanation for the CSC's failures, for, as the Committee aptly noted:

[12] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 23-4 (1971) (hereinafter cited as *House Report*); *History* at 83-4; cited in part in *Morton* v. *Mancari, supra,* 417 U.S. at 546 n.22.

[13] The continued workings of this process are vividly illustrated by the case at bar, in which the hearing examiner found that petitioner had been discriminated against, and the defendant agency simply rejected the examiner's adverse findings. (Pet. App. 1a-17a, 18a-21a).

[14] In the case at bar, the Board of Appeals and Review affirmed the defendant agency's decision against petitioner. (Pet. App. 21a-29a).

> "The system, which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest." *House Report* at 24, *History* at 84.

In the face of these findings, the House Committee favorably reported the "Hawkins Bill" (named after its chief sponsor, Representative Hawkins), which prohibited discrimination in federal hiring and promotion, and authorized the Equal Employment Opportunity Commission (EEOC), rather than the CSC, to enforce that prohibition.[15]

The Hawkins Bill also granted the EEOC power to issue cease and desist orders in private sector actions, as well as "authority to enforce" by rule, regulation, and order, the federal sector anti-discrimination provisions of Title VII.[16] Federal and private sector parties aggrieved by any order of the EEOC were entitled to bring actions in federal court. *However, the scope of the judicial proceedings after an EEOC hearing was much more limited in private sector cases than in federal sector cases.*

In private sector cases, under the Hawkins Bill, judicial review after an EEOC hearing was governed by amended Section 706. Such review was in a United States Court of Appeals; and the findings of the Commission were conclusive if supported by substantial

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[15] H.R. 1746, 92d Cong., 1st Sess. (1971); *History* at 32-60; excerpted in *Hackley* v. *Roudebush, supra,* 520 F.2d at 159-163.

[16] H.R. 1746, § 11, 92d Cong., 1st Sess. (1971), proposing to add new subsection 717(b) to the Civil Rights Act of 1964; *History* at 59; *Hackley* v. *Roudebush, supra,* 520 F.2d at 163.

evidence.[17] This would have represented a change in the existing law, which clearly granted all private sector employees the right to a plenary judicial hearing. Under the Hawkins Bill the judicial process could also be invoked in private sector cases without an EEOC hearing: for example, when the EEOC dismissed a complaint without a hearing for lack of reasonable cause, or when the EEOC failed to take action on a complaint within 180 days of its filing. Private sector actions in these circumstances were governed by a new Section 715, which provided for a civil action in federal district court. Since there would be no administrative record to review in these cases, the judicial process in these circumstances was not limited to review of an administrative record.[18]

In federal sector cases, under the Hawkins Bill, *all* judicial proceedings, whether or not there had been an EEOC hearing, were governed by Section 715, the section applicable to private sector actions in which there had been no EEOC hearing.[19] Under the Hawkins Bill, therefore, federal sector actions were not limited to a review of the administrative proceedings in any circumstances. *All* federal sector actions were plenary judicial proceedings in the district court.

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[17] H.R. 1746, § 4, 92d Cong., 1st Sess. (1971), proposing to amend Section 706 of the Civil Rights Act of 1964; *History* at 33-44; excerpted in *Hackley* v. *Roudebush, supra,* 520 F.2d at 159-161.

[18] H.R. 1746, § 8(j), 92d Cong., 1st Sess. (1971), proposing to add new Section 715 to the Civil Rights Act of 1964; *History* at 54-8; excerpted in *Hackley* v. *Roudebush, supra,* 520 F.2d at 162-3.

[19] H.R. 1746, § 11, 92d Cong., 1st Sess. (1971), proposing to add new subsection 717(d) to the Civil Rights Act of 1964; *History* at 59; *Hackley* v. *Roudebush, supra,* 520 F.2d at 163.

In the House, the provision of the Hawkins Bill granting the EEOC cease and desist powers met considerable resistance. The House adopted the "Erlenborn Bill" (sponsored by Representative Erlenborn) as an amendment to the Hawkins Bill in the nature of a complete substitute. The Erlenborn substitute did not provide EEOC with cease and desist powers, and did not cover federal employees at all.[20]

On the Senate side, the "Williams Bill" (named after Senator Williams, its chief sponsor) was the equivalent of the Hawkins Bill.[21] The amended version of the Williams Bill which emerged from the Senate Committee on Labor and Public Welfare (the "Committee Bill") [22] contained essentially the same provisions—and the same dichotomies— regarding federal sector and private sector actions which had been contained in the Hawkins Bill. Under the Committee Bill, however, the CSC was substituted for the EEOC as the administrative agency with enforcement authority in the federal sector. Under the Committee Bill, the powers of the CSC were the same as those of the EEOC in the federal sector under the Hawkins Bill, and the provisions for judicial review of CSC action were the same as those for review of EEOC federal sector action under the Hawkins Bill. Federal sector plaintiffs had the option to enter court after final agency or CSC action. *All* federal sector actions were plenary judicial

[20] H.R. 9247, 92d Cong., 1st Sess. (1971); *History* at 141-7; amendment in nature of substitute agreed to, *History* at 311-314; *see*, House Bill as referred to Senate, H.R. 1746, 92d Cong., 1st Sess. (1971); *History* at 326-332.

[21] S. 2515, 92d Cong., 1st Sess. (1971); *History* at 157-187.

[22] S. 2515, 92d Cong., 1st Sess. (1971); *History* at 344-409; excerpted in *Hackley* v. *Roudebush, supra,* 520 F.2d at 163-8.

proceedings in the district court, governed by the same provisions that governed private sector actions without an EEOC hearing; federal sector actions, unlike private sector actions, were not limited to a review of the administrative proceedings in any circumstances.[23]

Since the Committee Bill gave the EEOC cease and desist powers in the private sector, it, like the Hawkins Bill in the House, encountered a stiff floor fight, and also a filibuster which was eventually terminated by cloture. Ultimately, the EEOC private sector cease and desist authority was dropped, but the Committee Bill's federal sector provisions were retained. Under the finally enacted legislation [24]—as under the Hawkins Bill and the Committee Bill—the scope of judicial proceedings in federal sector cases was not restricted, and was governed by the private sector civil action provisions affording a plenary judicial trial.[25] Thus the continuation of responsibility for the administrative enforcement of federal sector Title VII policy in the CSC rather than the EEOC—under the Committee Bill and the legislation as finally enacted [26]—in no way limited judicial review of federal agency action. The CSC under the Committee Bill had the same responsibilities and powers as the EEOC had in the federal sector under the Hawkins and Williams bills; and as noted above, *federal sector actions were governed by*

[23] S. 2515, §§ 4, 11, 92d Cong., 1st Sess. (1971), proposing to amend the Civil Rights Act of 1964 by renumbered subsections 706(q)-(w) and new subsection 717(d); *History* at 390-393, 408; *Hackley* v. *Roudebush, supra,* 520 F.2d at 166-8.

[24] Pub. L. 92-261 (Mar. 24, 1972); *History* at 1911-1921. [*See also,* Title VII as amended, *History* at 1892-1910.]

[25] 42 U.S.C. §§ 2000e-5(f)-(k), 2000e-16(d).

[26] 42 U.S.C. § 2000e-16(b).

exactly the same provisions under all three bills, namely, the district court civil action provisions which did not limit the court to review of the administrative record. Again, as explained in detail in Argument I(B), *supra,* it is these same provisions which govern federal sector actions—as well as private sector and state and local government sector actions—under the 1972 amendments as finally enacted.

2. The Authoritative Statements of Legislative Intent

Turning now from the foregoing technical analysis to the larger perspective, it is clear that the unitary structure of amended Title VII—under which all civil actions are governed by the same judicial procedures—fully implements the basic congressional purpose with respect to the federal sector. That purpose, consistently articulated throughout the hearings, reports, and debates on the 1972 amendments, was to place federal employees and applicants on a par with employees and applicants in the private sector.

Thus the House Committee stated that

> ". . . there can exist no justification for anything but a vigorous effort to accord Federal employees *the same rights and impartial treatment* which the law seeks to afford employees in the private sector." *House Report* at 23; *History* at 83 (emphasis added).

The Senate Committee report was to the same effect:

> "Aggrieved [Federal] employees or applicants will also have *the full rights available in the courts as are granted to individuals in the private sector under title VII.*" S.Rep. No. 92-415, 92d Cong., 1st Sess. at 16 (1971); *History* at 425 (emphasis added).

Senator Dominick and Senator Cranston were chiefly responsible for the Committee compromise which gave administrative enforcement responsibility to the CSC rather than the EEOC while guaranteeing the federal employee the right to a judicial determination of his complaint. Senator Dominick supported Title VII protection for federal employees, but opposed (ultimately with success) giving the EEOC cease and desist powers in the private sector because he felt that the courts would provide a fairer and more efficient forum than an administrative agency. He stated his view of the proper relationship between private sector cases and cases against federal, state and local government defendants as follows:

> "[I]t strikes me that one of the first things we have to do is at least to *put employees holding their jobs, be they government or private employees, on the same plane so that they have the same rights, so that they have the same opportunities,* and so that they have the same equality within their jobs, to make sure that they are not being discriminated against and have the enforcement, investigatory procedure carried out the same way." 118 Cong. Rec. 594 (Jan. 20, 1972); *History* at 680-681 (emphasis added).

And in the following passage, Senator Dominick successfully urged defeat of cease and desist and limited judicial review in the private sector, and discussed the effect of the Committee compromise in the federal sector:

> "[Under Section 717 and other provisions of the Committee compromise] *every governmental*

> *agency and every employee of a governmental agency, State, local, or Federal, has his rights in the Federal courts.* Under [S. 2515, granting EEOC cease and desist power and limiting review in private civil actions] . . . you do not have that right if you are a private employee or a private employer. I, for the life of me, cannot see why we should discriminate against that one group. It seems to me that where we are dealing with job discrimination, it makes no difference what type of job you have, *you should be entitled to the same remedies as anyone else in that situation has, and this is the right to have the Federal court determine whether or not you have been discriminated against.*" 118 Cong. Rec. 3967 (Feb. 15, 1972); *History* at 1527 (emphasis added).

The record of Senate debate is permeated with Senator Dominick's restatement of this need for identical treatment of all employees.[27]

The House Committee and Senate Committee statements, and remarks by Senator Dominick, are the most authoritative expressions of the basic congressional intent with respect to the 1972 amendments. In view of the pivotal role played by Senator Dominick [28] with respect to the matters relevant here, and the fact that the amendments as enacted clearly constitute an adoption of the viewpoint which he advocated on these matters, Senator Dominick's comments are plainly to be accorded considerable weight.

The weight to be attached to certain statements by Senator Cranston and Senator Williams, on the other

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[27] 118 Cong. Rec. 595 (Jan. 20, 1972), 698 (Jan. 21, 1972), 942, 943 (Jan. 24, 1972), 3389 (Feb. 9, 1972), 3809 (Feb. 14, 1972); *History* at 683, 695, 833, 835, 1440-1441, 1482.

[28] *See, Hackley* v. *Roudebush, supra,* 520 F.2d at 129-131, 144-6.

hand, has been the subject of controversy. While this controversy is understandable, it is, in petitioner's view, not of controlling significance, because of the overwhelming weight of the authoritative legislative history already described.

Senator Cranston made the following statement, which supports petitioner's position in the case at bar, with respect to the precise legal effect of the Committee compromise in the federal sector that he and Senator Dominick co-authored:

> "As with other cases brought under Title VII of the Civil Rights Act of 1964, *Federal district court review would not be based on the agency and/or CSC record and would be a trial de novo.*" 118 Cong. Rec. 4929 (Feb. 22, 1972) (emphasis added).

The question of the weight that may be attached to this remark in view of the manner in which it was originally reported in the *Congressional Record* is discussed in the margin.[29]

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[29] Senator Cranston's remark as originally reported in the daily edition of the *Congressional Record* [118 Cong. Rec. S 2287 (daily ed., Feb. 22, 1972); *History* at 1744] was, due to a transposition of the word 'not', to the opposite effect from the remark as quoted in the text, *supra.* Senator Cranston spoke to this matter, and corrected the *Record,* ten months after the 1972 amendments became effective. 119 Cong. Rec. S 1219 (daily ed., Jan. 23, 1973). The Third Circuit and the District of Columbia Circuit, while agreeing with the corrected version of Senator Cranston's comment, have not relied upon it. *Sperling* v. *United States,* 515 F.2d 465, 480-481 n.72 (3rd Cir. 1975), *pet. for cert. pending,* No. 75-247; *Hackley* v. *Roudebush, supra,* 520 F.2d at 133-4, 147-8. Petitioner submits, however, that the corrected version of the comment is not wholly neutralized by its surrounding circumstances. First, the uncorrected version of the comment is plainly inconsistent on its face because it wrongly portrays the law under the Civil Rights Act of 1964. Thus, Senator Cranston's assertion that the *Record,*

Senator Williams made a number of statements which are inconsistent with one another and even, in the case of the following statement, internally inconsistent:

> "Finally, written expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for *a review of the administrative proceeding record* after a final order by his agency or by the Civil Service Commission, if he is dissatisfied with that decision. Previously, there have been unrealistically high barriers which prevented or discouraged a Federal employee from taking a case to court. This will no longer be the case. There is no reason why a Federal employee should not have *the same private right of action enjoyed by individuals in the private sector*; and I believe that the committee has acted wisely in this regard." 118 Cong. Rec. 4922 (Feb. 22, 1972); *History* at 1727 (emphasis added).

The reasons why no weight should be attached to this and certain other comments by Senator Williams are discussed in the margin.[30]

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and not he, was in error is the most plausible explanation of the matter. Second, it appears to petitioner that the uncorrected version printed in the daily edition of the *Record* could not have influenced the Senate vote on the federal sector amendments. That vote took place on February 22, 1972—the same day that Senator Cranston's comments were made, and, it seems fair to assume, before the daily edition of the *Record* for that date was printed and available. 118 Cong. Rec. 4944 (Feb. 22, 1972); *History* at 1779.

[30] The statement quoted in the text is internally inconsistent both because the Committee Bill, as noted above, provided that all federal sector actions were to be civil actions in the district court rather than actions for review of administrative determinations in the court of appeals; and because the Dominick amendment, eliminating cease and desist and court of appeals review in the private

Petitioner believes that Senator Cranston's statement is an additional item which may properly be considered to support her position, and that Senator Williams' statements are so self-contradictory that they may not properly be considered to detract from her position. More importantly, however, the controversy over the Cranston and Williams statements simply cannot obscure the clear thrust of the legislative history taken as a whole and set forth *supra*. That legislative history lends itself to only one fair interpretation: the 1972 amendments to Title VII were intended to give federal victims of employment discrimination the same civil action rights as private employees possess, including the right to a plenary judicial trial. This has been the conclusion of the two courts of appeals which have engaged in a detailed analysis of the legislative history. *Hackley* v. *Roudebush, supra; Sperling* v. *United States, supra*. The opinion of the court of appeals in the case at bar is devoid of any analysis in support of its contrary conclusion.

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sector and substituting plenary judicial proceedings in district court, had already been adopted. Similarly, the reference to "review of the agency proceedings" in one analysis of S. 2515 which Senator Williams inserted into the record [118 Cong. Rec. 4923 (Feb. 22, 1972); *History* at 1730] is inconsistent in this respect with the Williams Committee's own report on Section 717 [S. Rep. No. 92-415, 92d Cong., 1st Sess. at 16-17, 45-6 (1971); *History* at 425, 454-5], as well as with a section-by-section analysis of the 1972 amendments as finally enacted which Senator Williams inserted into the record: "The provisions of sections 706(f) through (k), concerning private civil actions by aggrieved persons, are made applicable to aggrieved Federal employees or applicants for employment." 118 Cong. Rec. 7169 (Mar. 6, 1972); *History* at 1851. The Third Circuit and the District of Columbia Circuit have each analyzed in detail, and properly rejected, Senator Williams' references to "review of agency proceedings." *Sperling* v. *United States, supra,* 515 F.2d at 479-481, 480 n.71; *Hackley* v. *Roudebush, supra,* 520 F.2d at 132-5, 146-7.

3. The Consistent Logic of the Final Legislative Product

The congressional intent to afford plenary judicial proceedings in federal sector cases is perfectly consistent with the contemporaneous determination to maintain the Civil Service Commission's administrative role in the federal sector. (*See,* 42 U.S.C. § 2000e-16(b)). Congress intended that the courts would provide federal sector litigants a full evidentiary hearing as a check on the Civil Service Commission, just as it intended that the courts would provide private sector litigants a full evidentiary hearing as a check on the Equal Employment Opportunity Commission. The opportunity for a full judicial hearing was provided in both federal and private sector cases in part because Congress expressly recognized that both CSC and EEOC were inherently partisans, though partisans of different standards. CSC was viewed as a partisan of the federal employer, since it is responsible for the approval of the very agency employment standards whose lawfulness many Title VII complainants call into question. EEOC was viewed as a partisan of the private employee, since it is the prosecutor of his case.

Thus the Senate Committee report on Section 717 states: [31]

> "The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for

[31] For further remarks regarding Civil Service Commission bias, *see* Remarks of Rep. Fauntroy, 117 Cong. Rec. 32094-5 (Sept. 16, 1971), *History* at 269-271; and Remarks of Rep. Mink, 117 Cong. Rec. 32105 (Sept. 16, 1971), *History* at 299. The "built-in conflict of interest" characterization is also contained in the *House Report* at 24, *History* at 84, quoted *supra,* text at p. 34.

> examining the Government's equal employment program for structural defects which may result in a lack of true equal employment opportunity.
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> * * *
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> "An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision." S. Rep. No. 92-415, 92d Cong., 1st Sess. at 15-16 (1971); *History* at 424-5.

This passage concerning the federal sector is precisely analogous to a statement of Senator Dominick, who described the difference between committing the evidentiary proceeding in private sector Title VII litigation to EEOC and committing this function to a federal court (which could appoint a special master) in these terms: [32]

> "[T]he latter preserves the impartiality of the court, the jurisdiction of the court, and the integrity of the referees and examiners who have been trained in that field. But if we assign [evidentiary determinations] to the Commission, . . . the Commission is going to prosecute, investigate, and hear the case, and then say to the court, 'OK, these are our recommendations, which have the substantial force of evidence; you enforce them.'" 118 Cong. Rec. 3389 (Feb. 9, 1972); *History* at 1441.

Congress responded to concerns such as those expressed by Senator Dominick and applied its response to both private and federal sector actions: EEOC cease

[32] For further remarks regarding EEOC partisanship, *see* Minority Views on H.R. 1746, *House Report* at 58-9, *History* at 118-119; Remarks of Senator Dominick, 118 Cong. Rec. 3966-7 (Feb. 15, 1972), *History* at 1524-1527.

and desist power was rejected, and amended Title VII provides for plenary court hearings (and the possible appointment by the court of a special master) in both federal and private sector proceedings. 42 U.S.C. §§ 2000e-16(d) and 2000e-5(f)(5).[33]

The conclusion that Congress granted federal sector litigants the right to a full evidentiary hearing in court is also fully consistent with the purpose of maintaining an internal grievance procedure within the federal government. Congress carefully provided in subsection 717(c) that prior to filing suit under Title VII a federal sector complainant must first file a formal complaint with his agency, and await an agency decision, so that the agency will have an opportunity to put its own house in order. As soon as the agency reaches a decision, however, or permits 180 days to pass without taking final action, this policy has been fulfilled, and the complainant may proceed directly to court. If the complainant prefers first to proceed to further stages in the internal grievance procedure, he is free to do so; but no penalty attaches to such an election (so as not to deter further resort to administrative procedures), and subsequent timely resort to a court action still results in a plenary judicial trial. These conclu-

[33] While the EEOC has never had enforcement powers, the CSC's enforcement powers pre-dated the 1972 amendments. The proposed substitution of EEOC for CSC in the federal scetor was rejected. The fact that no opposition was then raised to continued CSC enforcement powers is fully consistent with the foregoing analysis. The initial proponents of the 1972 amendments would have had no occasion to object at this point to CSC enforcement powers, since the legislation provided plenary judicial proceedings in federal sector cases. The CSC, of course, wished to retain its powers; and its pro-defendant bias would have precluded any fears that a federal defendant would suffer from any lack of due process at its hands.

sions are perfectly consistent with the dual policy of preserving the internal grievance procedure but also providing a judicial remedy.

D. The Lower Court Decisions under Amended Title VII May Be Analyzed in Terms of Three Basic Categories.

1. Overview of the Cases

When the petition for certiorari was filed herein, the rule advocated by petitioner was a minority position in the lower courts. At this writing, the lower courts are evenly divided on the issue.

Three courts of appeals—the Third, Seventh, and District of Columbia Circuits—have ruled that federal sector Title VII cases are, like all other Title VII cases, to be conducted as plenary judicial proceedings. *Sperling* v. *United States,* 515 F.2d 465 (3rd Cir. 1975), *pet. for cert. pending,* No. 75-247;[34] *Caro* v. *Schultz,* 521 F.2d 1084 (7th Cir. 1975)[35]; *Hackley* v. *Roudebush,* 520 F.2d 108 (D.C. Cir. 1975)[36].

Three other courts of appeals—the Eight, Ninth, and Tenth Circuits—have rejected this approach, and provided for less than plenary judicial proceedings. *Salone* v. *United States,* 511 F.2d 902 (10th Cir. 1975), *pet. for cert. pending,* No. 74-1600; *Chandler* v. *Johnson,* 515 F.2d 251 (9th Cir. 1975), *cert. granted sub nom Chandler* v. *Roudebush,* 44 U.S.L.W. 3200 (U.S., Oct. 6, 1975) (the case at bar)[37]; *Haire* v. *Cal-*

[34] *Accord, Ettinger* v. *Johnson,* 518 F.2d 648 (3rd Cir. 1975).

[35] *See also, Adams* v. *Brinegar,* 521 F.2d 129, 132-3 (7th Cir. 1975).

[36] *See also, Grubbs* v. *Butz,* 514 F.2d 1323 (D.C. Cir. 1975).

[37] *Cf., Bowers* v. *Campbell,* 505 F.2d 1155 (9th Cir. 1974) (decided under 42 U.S.C. § 1981).

loway, —— F.2d ——, 10 [CCH] EPD ¶——, 11 F.E.P. Cases 769, 8th Cir. Nos. 74-2004, 75-1050, Nov. 17, 1975.

The other circuits have not yet ruled on the issue.[38] However, a decision of the Fifth Circuit on a related issue[39] strongly suggests agreement with petitioner's position on the issue in the case at bar:

> ". . . the instant federal employee suit is brought under Title VII. The intent of Congress in enacting the 1972 amendments to that Act extending its coverage to federal employment was to give those public employees the same rights as private employees enjoy." *Parks* v. *Dunlop,* 517 F.2d 785, 787 (5th Cir. 1975) (footnotes omitted).[40]

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[38] In *Fisher* v. *Brennan,* 517 F.2d 1404 (6th Cir. 1975), the court of appeals affirmed, without published opinion, the district court decision in 384 F.Supp. 174 (E.D. Tenn. 1974). Petitioner has examined the unpublished order of affirmance and the briefs of the parties in this case. It is clear that the scope of review issue was not raised in the court of appeals, and that the summary affirmance does not constitute a ruling on the issue. Petitioner assumes that respondents will not contend otherwise.

Similarly, it seems clear from the court of appeals' opinion in *Johnson* v. *U.S. Postal Service,* 364 F.Supp. 37 (N.D. Fla. 1973), *aff'd per curiam,* 497 F.2d 128 (5th Cir. 1974), that the scope of review issue was not raised in that appeal.

[39] The availability in the federal sector of preliminary injunctive relief under *Drew* v. *Liberty Mutual Ins. Co.,* 480 F.2d 69 (5th Cir. 1973).

[40] In addition, it is noteworthy that the Fourth Circuit, in ruling on another issue under the federal sector Title VII provisions, made reference to the 1972 amendments' "transfer of jurisdiction from the executive to the judiciary"; to "a congressional policy to make the courts the final tribunal for the resolution of controversies over charges in discrimination" in federal employment; and to the portion of the legislative history to the effect that the amendments provide to federal sector plainiffs "the full rights available in the courts as are granted to individuals in the

Most of the published district court decisions are cited in the petition for certiorari, and are not recited here. (Pet. 10 n.6, 10-12 n.7). Additional published district court cases holding in favor of[41] and against[42] plenary judicial proceedings are set forth in

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private sector under Title VII." *Koger* v. *Ball,* 497 F.2d 702, 706, 708-9 n.33 (4th Cir. 1974). The Solicitor General seems to have expressed agreement with the Fourth Circuit's analysis on the issue which *Koger* addressed. Memorandum in Response to Petition for Rehearing, at p. 4, *Place* v. *Weinberger,* No. 74-116 (October Term, 1974).

[41] *Second Circuit: McHoney* v. *Callaway,* 10 EPD ¶——, 11 F.E.P. Cases ——, E.D. N.Y., No. 74-C-1729, Oct. 10, 1975.

Fourth Circuit: Harris v. *Ulanich,* 10 EPD ¶ 10,262 (E.D. Va. 1974); *Chisholm* v. *U.S. Postal Service,* 9 EPD ¶ 10,212, 11 F.E.P. Cases 457 (W.D. N.C. 1975), *appeal pending,* 4th Cir. Nos. 75-2068, 75-2069.

Fifth Circuit: Jones v. *Brennan,* —— F.Supp. ——, 10 EPD ¶——, 11 F.E.P. Cases ——, N.D. Ga., Atl. Div., Civ. No. 19139, Sept. 30, 1975; *Keeler* v. *Hills,* 10 EPD ¶——, 11 F.E.P. Cases ——, N.D. Ga., Atl. Div., C.A. Nos. C74-2152A, C74-2309A, Nov. 12, 1975. [*Sylvester* v. *U.S. Postal Service,* cited at Pet. 10 n.6, is also reported at 393 F.Supp. 1334.]

Sixth Circuit: Williams v. *Tennessee Valley Authority,* 10 EPD ¶——, 11 F.E.P. Cases ——, M.D. Tenn., C.A. No. 75-186-NA-CV, Nov. 21, 1975.

Ninth Circuit: Ellis v. *Naval Air Rework Facility,* 10 EPD ¶ 10,257, 11 F.E.P. Cases 317 (N.D. Cal. 1975), 10 EPD ¶ 10,422, 11 F.E.P. Cases —— (N.D. Cal. 1975), 10 EPD ¶——, 11 F.E.P. Cases ——, N.D. Cal., No. C-73-1794 WHO, Nov. 4, 1975.

District of Columbia Circuit: Early v. *Klassen,* 10 EPD ¶——, 11 F.E.P. Cases ——, D.D.C., C.A. No. 75-153, Oct. 30, 1975.

[42] *Third Circuit: Warren* v. *Veterans Hospital,* 382 F.Supp. 303 (E.D. Pa. 1974); *McCreesh* v. *Berude,* 385 F.Supp. 1365 (E.D. Pa. 1974).

Fourth Circuit: Wright v. *Nat'l Archives and Records Service,* 388 F.Supp. 1205 (D. Md. 1975), *appeal pending,* 4th Cir. No. 75-1378.

Fifth Circuit: Davis v. *Dept. of H.E.W.,* 10 EPD ¶ 10,431 (E.D.

the margin. In the five circuits where the courts of appeals have not yet ruled on the issue, the cases are close to evenly divided.

2. The Three Different Rules Which Have Been Adopted

The cases in the lower courts may be analyzed in terms of three basic categories. First, three courts of appeals hold, with petitioner, that federal sector Title VII cases are, like all other cases, to be conducted as plenary judicial proceedings. Second, one court of appeals holds that such cases are to be conducted as reviews of the administrative record pursuant to a substantial evidence standard. Third, two courts of appeals hold for a hybrid approach, in which the primary focus is on review of the administrative record, but in which the plaintiff may supplement the administrative record upon a showing of necessity.

a. Plenary Judicial Proceedings

In the first court of appeals decision to hold for plenary judicial proceedings, the Third Circuit concluded that

> ". . . it was Congress' intent to provide an aggrieved federal employee with as full a panoply of remedies in the district court as those afforded a private sector litigant. . . . We hold therefore

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La. 1975); *Anderson* v. *Roudebush*, 10 EPD ¶ 10,328 (S.D. Ga. 1975).

Ninth Circuit: Jewell v. *Middendorf*, 10 F.E.P. Cases 1110 (C.D. Cal. 1975).

Tenth Circuit: Archuleta v. *Callaway*, 385 F.Supp. 385 (D. Colo. 1974).

District of Columbia Circuit: Johnson v. *Clotworthy*, 10 EPD ¶ 10,315 (D.D.C. 1975).

> that the statutory language of the Act, as well as its legislative history, indicates a right to a trial *de novo* in the district court when suit is brought by an aggrieved federal employee pursuant to § 717(c)." *Sperling* v. *United States*, *supra*, 515 F.2d at 481.

Sperling was followed by the Seventh Circuit, which noted that its conclusion was "in accord with the special regard that Congress has shown for those who suffer discrimination in employment." *Caro* v. *Schultz*, *supra*, 521 F.2d at 1088.[43] The Third and Seventh Circuits were then joined by the District of Columbia Circuit, which, in an encyclopedic opinion, unanimously and resoundingly reversed the seminal district court decision which had led numerous other courts astray on this issue.[44] The District of Columbia Circuit concluded

> ". . . that Congress intended to bestow on federal employees the same rights in District Court—including the right to a trial *de novo*—which it had previously mandated for private sector employees, and that the Federal Rules of Civil Procedure are flexible enough to enable trial judges to prevent such *de novo* trials from unduly burdening the courts or substantially duplicating agency proceedings." *Hackley* v. *Roudebush*, *supra*, 520 F.2d at 113 (footnote omitted).

It should be noted that none of the cases providing for plenary judicial proceedings excludes the possi-

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[43] The Seventh Circuit's opinion noted that "Because we are choosing one of the views on which there is a conflict between circuits, this opinion was circulated, before filing, to all judges of this Court in regular active service. There has been no request for a vote on a hearing *en banc* on this issue." *Id.*, at 1088 n.6.

[44] *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973), *rev'd sub nom Hackley* v. *Roudebush*, *supra*.

bility of summary judgment being entered in some cases. But only a real summary judgment, within the ordinary and accepted meaning of Fed.R.Civ.P. 56(c), would be possible, *i.e.,* summary judgment in a situation where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Sperling* v. *United States, supra,* 515 F.2d at 481-4; *Caro* v. *Schultz, supra,* 521 F.2d at 1089; *Hackley* v. *Roudebush, supra,* 520 F.2d at 157-8.[45]

b. Review Strictly Limited to the Administrative Record

The first court of appeals decision to reject plenary judicial proceedings was also the first appellate decision on the issue. The Tenth Circuit held that

> "The complaints of the nature here considered should be handled as others [under the Civil Service system], and if they reach the courts, the procedure should be consistent with those under 5 U.S.C. § 701 *et seq.*" *Salone* v. *United States, supra,* 511 F.2d at 904.

Salone represents the second category of decisions referred to above, under which the standard of the pre-

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[45] In some situations the administrative record might itself provide a basis for summary judgment. If, for example, uncontroverted evidence established that the plaintiff was never employed by and never applied for employment with the defendant agency, there would obviously be no genuine issue of material fact and the court could dispose of the plaintiff's fraudulent claim by summary judgment. Or, of course, the parties might agree to have the district court decide the case on the administrative record. But in most cases discovery would, if desired, have to be permitted before a motion for summary judgment could even be considered. Moreover, it must be recognized that summary judgments are rarely encountered in Title VII cases when the facts are contested.

Title VII adverse action cases is applied, and the decision of the agency or the Civil Service Commission is to be upheld if it is supported by "substantial evidence" in the administrative record.

c. Hybrid Approaches

The first court of appeals to adopt a hybrid approach—representing the third category of decisions referred to above—was the Ninth Circuit, in the case at bar. Here the court of appeals referred with approval to the district court decision in *Hackley* v. *Roudebush, supra* (hereinafter *'Hackley I'*), which held that

> "The trial *de novo* is not required in all cases. The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record." *Hackley* v. *Johnson,* 360 F.Supp. 1247, 1252 (D.D.C. 1973), *rev'd sub nom Hackley* v. *Roudebush, supra.*

While the court referred to *Hackley I* with approval, it is not clear whether it fully adopted the standard quoted above. *See, Chandler* v. *Johnson, supra,* 515 F.2d at 255. What is clear is that the Ninth Circuit held that a plaintiff who desires that the judicial proceedings extend beyond a review of the administrative record must make a specific showing—in the case at bar without any prior discovery—that more than a re-

view of the record is necessary in the circumstances of his or her particular case. *Id.*, at 255.

In a recent case the Eighth Circuit joined the Ninth as an exemplar of the category of decisions which adopt a hybrid approach. The Eight Circuit articulated its holding as follows:

> ". . . while we generally agree with the District of Columbia, Third, and Seventh Circuits that a federal employee is entitled to a judicial determination of the merits of his claim, we think district courts posses the power to make that decision summarily upon an administrative record that is fairly made and that completely discloses the relevant facts upon which the plaintiff relies.
>
> "As a corollary, the district court, on a showing of need, should exercise its discretion to re-open the record and hear additional evidence or permit the plaintiff to proceed to develop additional relevant evidence through discovery procedures. This discretion should be liberally exercised in order to assure that the federal employee-plaintiff is given a full and fair opportunity to develop all the facts bearing upon his claim.
>
> "However, where there is no sound basis for re-opening the record, the district court, without more, may proceed to a decision on the merits." *Haire* v. *Calloway, supra,* 10 EPD at p. ——, 11 F.E.P. Cases at 772 (footnote omitted).

Thus, under *Haire* as under the Ninth Circuit's decision in the case at bar, the focus of the judicial proceedings is on the administrative record, which may be "re-opened" and "supplemented" only upon a showing of necessity. However, the language in *Haire* concerning the circumstances under which the plaintiff may be permitted to conduct discovery is perhaps

more generous in tone than the language that the Ninth Circuit employed, which requires the plaintiff to show "that without judicial discovery, a case could not be made." 515 F.2d at 255.[46]

d. The Government's Position

It is not possible for petitioner to know at this point what position the respondents will adopt in this Court on the issue presented in the case at bar. It seems unlikely that error will be confessed.[47] As recently as October 23, 1975, the Department of Justice stated its position as follows in the Fifth Circuit:

> "This memorandum is filed in response to the October 8, 1975, request of this Court for a statement of the position of the Department of Justice on the availability to federal employees of a trial *de novo* in suits alleging discrimination in violation of Title VII of the Civil Rights Act.
>
> "The Department's position is that federal employees bringing discrimination suits under 42

[46] *Cf., Bowers* v. *Campbell, supra,* 505 F.2d at 1160-1161. In *Bowers,* decided under 42 U.S.C. § 1981, the Ninth Circuit provided for "a de novo decision by the district court based primarily on the administrative record (if it is determined to be fair and adequate) with provision for the admission of additional evidence. . . ." *Id.*, at 1161. "Both the employee and the employer shall have the *right* to adduce additional evidence to supplement the administrative record." *Id.* (emphasis added). *Bowers* thus appears to go beyond *Hackley I, Chandler* and *Haire,* since it provides a *right* to adduce additional evidence, and also since it would seem to imply a *right* to conduct discovery. (*Bowers* also clearly contemplates that any additional evidence is to be offered in the district court, thereby excluding the possibility, which under *Hackley I* is within the district court's discretion, of a "remand" to the administrative agency for further proceedings.)

[47] *But cf.,* Memorandum in Response to Petition for Rehearing, *Place* v. *Weinberger,* No. 74-116, October Term, 1974.

U.S.C. § 2000e-16(c) are not entitled to a trial *de novo* in the district court. Since the statute does not define the scope of judicial review or contain any requirement of a trial *de novo,* the scope of judicial review is that provided under the Administrative Procedure Act, *i.e.,* the administrative decision should be upheld unless 'unsupported by substantial evidence,' or 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2).

* * *

"The Government's position on the *de novo* issue is presented, e.g., in our brief in [*Swain* v. *Calloway,* 5th Cir. No. 75-2002] at pp. 32-38." Justice Department Memorandum in Response to Court Request, *Oringel* v. *Mathews,* 5th Cir. No. 74-3971 (Oct. 23, 1975).

The Department of Justice has thus recently confirmed its adherence to the second category of decisions described above, represented by the Tenth Circuit's decision in the *Salone* case. This is the position which the government has generally advocated in the lower courts, and was its position in tLe Ninth Circuit in the case at bar.[48]

E. This Court Should Adopt a Rule Providing for Plenary Judicial Proceedings in Federal Sector Cases, Because of the Express Language and Legislative History of the 1972 Amendments, As Well As Sound Policy Considerations.

Petitioner submits that the only rule which is consistent with the language, legislative history and purpose of the 1972 Title VII amendments is one which

[48] Notwithstanding the government's restatement of its position in the Fifth Circuit and the fact that said restatement was made after the grant of certiorari herein, it seems unlikely to petitioner that the government will assert this position in this Court.

provides for plenary judicial proceedings. There are a number of policy reasons why this is so, and these will presently be discussed. However, it cannot be overemphasized that, in petitioner's view, the controlling policy decision on this issue has already been made: Congress has determined that federal employees should have the same rights available in the courts as their private sector counterparts. As has been shown in Arguments I(B) and I(C), *supra,* and in *Hackley* v. *Roudebush* and *Sperling* v. *United States, supra,* to afford less than plenary judicial proceedings in federal sector Title VII cases would be to override the express will of Congress. The lower courts which have held otherwise do not even begin to explain how the plain import of the language and legislative history of the 1972 amendments can be avoided. While the Eighth, Ninth and Tenth Circuits assert that the language and legislative history are not decisive of the present issue, they offer virtually no reasoning in support of that conclusion. Petitioner believes that the contrary conclusion is inescapable.

The case at bar should not, therefore, be viewed as one in which the Court must choose between, or accommodate, conflicting policy considerations. But even if it were so viewed, a proper analysis of such considerations also compels the conclusion that federal sector Title VII actions should be conducted as plenary judicial proceedings.

1. Many of the cases declining to afford a plenary scope to federal sector civil actions proceed on the untenable assumption that no real change in the role of the judiciary was intended to be accomplished by the 1972 amendments. *Sperling* v. *United Staes, supra,*

515 F.2d at 474, 476-7. Thus the *Salone* line of cases—providing for review of the record under a "substantial evidence" test, the same standard as that enunciated in pre-Title VII adverse action cases—would limit the effect of the 1972 amendments to an explicit waiver of sovereign immunity and a removal of certain procedural problems which existed in pre-Title VII attempts to bring discrimination suits against the federal government.[49] It is plain that the 1972 amendments cannot be afforded such a narrow interpretation.[50]

While the *Hackley I, Chandler* and *Haire* cases theoretically go beyond the *Salone* approach, as a practical matter there is more similarity than difference between the two approaches. Indeed, many of the district court decisions which cite and purport to follow *Hackley I,* for example, in fact apply a "substantial evidence" test or an even less demanding standard.[51] At this writing, almost four years since the 1972 federal sector provisions became effective, there are only nine published decisions entering judgment on the merits in a plaintiff's favor against a federal defendant. In three of these a trial *de novo* was conducted; in two of the others evidence beyond the administrative record

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[49] *Compare Brown* v. *General Services Administration,* 507 F.2d 1300 (2d Cir. 1974), *cert. granted,* 421 U.S. 987 (1975), No. 74-768 *with Bowers* v. *Campbell,* 505 F.2d 1155 (9th Cir. 1974); *Penn* v. *Schlesinger,* 490 F.2d 700 (5th Cir. 1973), *rev'd on exhaustion of remedies issue,* 497 F.2d 970 (5th Cir. 1974) (en banc), *pet. for cert. pending,* No. 74-476; *Petterway* v. *V.A. Hospital,* 495 F.2d 1223 (5th Cir. 1974).

[50] With respect to the argument that the 1972 amendments' sole or primary purpose was to provide "access" to judicial review in the face of the defense of sovereign immunity, *see, Hackley* v. *Roudebush, supra,* 520 F.2d at 142, 142 n.138; *see also, Sperling* v. *United States, supra,* 515 F.2d at 476-7.

[51] *See, e.g.,* cases cited at Pet. 14 n.8.

was received; and in two of the others a finding of discrimination had been made at the administrative level.[52] Of course it is possible that in all of the numerous other cases where summary judgment has been entered in the government's favor on the basis of the administrative record, the claim of discrimination was not meritorious. A more reasonable inference, however, is that the effectiveness of the 1972 amendments has been drastically impaired by both approaches which insulate the federal government's employment practices from plenary judicial scrutiny. As a prescient district court warned in 1973:

> ". . . it is simply too easy for a federal judge operating under *Hackley* [*I*] to lapse, in his discretion, into a review of the record using the substantial evidence test or the test set forth in *Chiriaco* v. *United States* [procedural due process and absence of arbitrary or capricious agency action]. . . . Only if a trial de novo is mandatory will the federal employee be assured of the congressional intent and that is a full, impartial review of the case in an adversary context." *Jackson* v. *U.S. Civil Service Comm'n,* 379 F.Supp. 589, 594 (S.D. Tex. 1973) (emphasis added).

2. There is another reason why anything less than a right to plenary judicial proceedings places the federal sector plaintiff at a unique and wholly unjustified disadvantage. Under the *Chandler* and *Haire* approach

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[52] Cases cited at Pet. 15 n.9; *Rogers* v. *E.E.O.C.,* 10 EPD ¶ 10,416, 11 F.E.P. Cases 337 (D.D.C. 1975) (trial *de novo*); *Smith* v. *Fletcher,* 10 EPD ¶ 10,329 (S.D. Tex. 1975) (supplemental evidence received); *Palmer* v. *Rogers,* 10 EPD ¶ 10,265 (D.D.C. 1975) (discrimination found at administrative level); *Davis* v. *Dept. of H.E.W.,* 10 EPD ¶ 10,341 (E.D. La. 1975) (discrimination found at administrative level); *Hammond* v. *Balzano,* 10 EPD ¶ 10,333 (D.D.C. 1975).

no less than under the *Salone* approach, the initial and primary focus of the district court is on the administrative record, and the plaintiff is saddled with the burden of demonstrating that it is necessary for the court to go beyond a review of that record. In such a situation—and without any prior access to discovery or compulsory process—the plaintiff is immediately placed in a defensive posture because of the existence of an administrative record compiled under the direction and control of the government. Rather than being permitted to develop his case through the normal process of discovery and present his case to the court through the normal process of a plenary trial, the plaintiff is instead required to show a persuasive justification for discovering and offering any evidence beyond the administrative record, and for presenting any live testimony to the district court as trier of fact. Yet there is simply no good reason why a federal sector Title VII plaintiff should not be able to "proceed in court like any other litigant, subject to informal steps to avoid what is shown to be an unnecessary duplication of the administrative record, rather than be required to make an affirmative showing persuading the judge that there is a 'need' before he can exercise procedures routinely accorded to civil litigants." *Hackley* v. *Roudebush, supra,* 520 F.2d at 171 (Leventhal, J., concurring). And it should be re-emphasized in this connection that the procedures which are "routinely accorded to civil litigants" are fully available to plaintiffs in Title VII actions against private companies, unions, and employment agencies, as well as in Title VII actions against state, county and muncipal governments. As noted in Argument I(A), *supra,* the basic purpose of the 1972 amendments would be undermined by the manifest injustice of a double standard

which operates to the unique advantage of one particular kind of Title VII defendant.

3. The argument most frequently advanced in support of such a double standard and in favor of a more restrictive approach in federal sector cases is that it would be a waste of judicial resources to permit plenary proceedings in district court when an administrative proceeding record is available. This argument assumes that the "equivalent" of the plenary judicial proceedings which are available in all other Title VII cases may be provided in the federal sector by a review of the administrative record, as supplemented upon a showing of necessity.[53] This argument, like the assumption behind it, is faulty for a number of compelling reasons.

In the first place, it is difficult to imagine how a judicial remedy which does not include the right to conduct discovery and the right to have the court evaluate the credibility of witnesses by observing their testimony could possibly be deemed "equivalent" to the *de novo* judicial proceeding which Congress and this Court have mandated in private sector Title VII cases. The administrative procedure provided by the Civil Service Commission's regulations (5 C.F.R. §§ 713.201, *et seq.*) is certainly not equivalent to a judicial proceeding. Consideration of a few key deficiencies will highlight the obvious shortcomings of this administrative procedure. Typically, as in the case at bar, the complainant is not represented by an attorney at the administrative level; in any event, there is no provision

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[53] *E.g., Chandler* v. *Johnson, supra,* 515 F.2d at 255; *Haire* v. *Calloway, supra,* 10 EPD at p. ——, 11 F.E.P. Cases at 771-2.

for court appointment of an attorney for the complainant, or for an award of attorneys' fees if the complainant prevails.[54] The investigation which is conducted is produced under the direction of, and entirely controlled by, the agency which is the defendant in any subsequent judicial proceedings. Only if the complainant so elects is an administrative evidentiary hearing held, and even then there is no subpoena power available to the complainant, and no right to discovery comparable to that provided by the Federal Rules of Civil Procedure. And the CSC's own handbook for complaints examiners explains that "[t]he hearing is an adjunct to the investigation. *It is not an adversary proceeding but is an administrative proceeding designed to provide additional evidence.*" [55]

Beyond this, a detailed review of the administrative procedure convincingly demonstrates that the inherent bias and inadequacies which were so severely criticized prior to the 1972 amendments remain intact to this date, notwithstanding the CSC's post-Act revisions in the procedure. *See, Hackley* v. *Roudebush, supra,* 520 F.2d at 137-141 (opinion of Wright, J.), concluding after extensive analysis that "the CSC's nonadversarial fact-finding procedures and inherent structural defects persist essentially unchanged, and do not guarantee federal employees a full and fair hearing on their claims of employment discrimination. . . ." [56] *See*

[54] *Compare,* 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(k).

[55] U.S. Civil Service Commission, *Discrimination Complaint Examiner's Handbook* (April, 1973), at p. 5.

[56] *Accord,* U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* Vol. V, "To Eliminate Employment Discrimination" (July, 1975), at pp. 61-86; Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae.

also, Hackley v. *Roudebush, supra,* 520 F.2d at 171 (Leventhal, J., concurring): "the complaint hearing falls short of a Title VII action in certain of the crucial respects stressed in *Alexander* v. *Gardner-Denver* —the lack of compulsory process, except as to government employees; the dispensation with usual rules of evidence; and particularly the lack of discovery procedures. Significantly, the agency complaint hearing has been structured to avoid an 'adversary' quality. . . . And the Manual virtually instructs the Examiner in terms that equate a finding of discrimination with a situation in which there is no reasonable doubt to the contrary. [Footnote omitted.]"

But even if the administrative process were better than it is, the proper result on the issue at bar would be the same. In that sense, the empirical question of the post-1972 performance of the Civil Service Commission is simply not the issue in the case at bar. *See, Hackley* v. *Roudebush, supra,* 520 F.2d at 172 (Leventhal and Davis, JJ., concurring). For in the closely analogous case of *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974), this Court squarely rejected any concept of "deferral" to the results of an arbitration process, however well-designed. In *Alexander* the respondent's proposed deferral rule [57] was rejected because:

> "[t]he rule's obvious consequence . . . would be to deprive the petitioner of his statutory right to attempt to establish his claim in a federal court. . . . The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII;

[57] 415 U.S. at 55-6.

deferral to arbitral decisions would be inconsistent with that goal." 415 U.S. at 55-6.

A more stringent deferral standard was also rejected in *Alexander:*

> "Nor are we convinced that the solution lies in applying a more demanding deferral standard, such as that adopted by the Fifth Circuit in Rios v. Reynolds Metals Co., 467 F.2d 54 (1972). [Footnote omitted.] As respondent points out, *a standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process.* And judicial enforcement of such a standard would almost require courts to make de novo determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights." 415 U.S. at 58-9 (emphasis added).

The very same reasoning applies to the CSC-devised administrative procedure in the federal sector. That procedure certainly is not an adequate substitute for plenary judicial proceedings; and to try to make it so would probably destroy its utility as a vehicle for possible informal resolution of complaints without resort to the judicial process.

4. At the same time, it has never been disputed that the administrative decisions in federal sector Title VII cases may, like arbitral decisions in private sector cases, be admitted into evidence and accorded such weight as the court deems appropriate. *Cf., Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 60. Moreover, the rest of the administrative record would also be admissible, subject only to the limitations of the Federal Rules of Civil Procedure and the Federal

Rules of Evidence. *Hackley* v. *Roudebush, supra,* 520 F.2d at 156-7; *Sperling* v. *United States, supra,* 515 F.2d at 484; *Caro* v. *Schultz, supra,* 521 F.2d at 1089. The essential point, however, is that the administrative record must not be the narrow focus of the judicial proceeding. It may be considered for whatever light it sheds on the facts at issue; but it may not be utilized as a weapon for limiting the scope of otherwise proper discovery or impairing the plaintiff's access to the normal mechanisms of judicial factfinding. *Hackley* v. *Roudebush, supra,* 520 F.2d at 151.

Nor is there any ground for believing that it is necessary or desirable to deny federal sector plaintiffs the rights available to their private sector counterparts in order to assure that these cases are efficiently conducted:

> "The informal means available to a judge to shape the course of a trial would ordinarily suffice to obviate duplication without a purpose, just as a judge routinely takes steps to avoid cumulative testimony. But that does not warrant omission of the testimony of crucial witnesses, whose demeanor is of manifest importance to the factfinding function. And the significant discovery right should not be impaired." *Hackley* v. *Roudebush, supra,* 520 F.2d at 171 (Leventhal, J., concurring).

Discovery is a crucial element of any Title VII action—even of a single-plaintiff, individual case. *E.g., McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 804-5 (1973); *Burns* v. *Thiokol Chemical Corp.,* 483 F.2d 300 (5th Cir. 1973). It is obviously unacceptable to place upon the federal sector plaintiff a burden to justify the invocation of this fundamental right, which is fully available as a matter of course to all other Title

VII litigants. Of course it is always open to any defendant to move for a protective order in appropriate circumstances; but it is the defendant's burden to show that such an order is necessary within the meaning of Fed.R.Civ.P. 26(c) as normally applied in Title VII cases. The mere fact that an administrative investigation has occurred provides no justification for depriving the plaintiff of the right to discovery.

Similarly, there is no warrant for assuming that the parties in a federal sector Title VII case will attempt without reason to present truly duplicative testimony, any more than the parties in any other case will seek unnecessarily to call witnesses whose live testimony would be truly duplicative of their deposition testimony. To the extent that any testimony offered is in fact unnecessarily duplicative, a district court can control it in the same way it controls testimony in any other plenary judicial proceeding. On the other hand, to the extent that testimony or cross-examination at an administrative hearing is honestly felt by a party to be inadequate, federal sector Title VII litigants should certainly have the same right to call witnesses as is enjoyed by parties in any civil litigation in which witnesses' depositions have previously been taken. It is also important to recall that even in those cases where an administrative evidentiary hearing has been held, the complainant has frequently not been represented by an attorney. Moreover,

> ". . . merely because an individual testified at the agency level does not mean that he would not be required to testify at the trial in District Court. The decision as to whether a particular witness should be called remains with counsel; although a trial judge has discretion to limit cumulative testimony, a witness' trial testimony is not cumulative merely because it repeats his testimony before the agency." *Hackley* v. *Roudebush, supra,* 520 F.2d at 158-9.

5. A frequently unarticulated [58] policy consideration behind those decisions which have denied a right to plenary judicial proceedings is the belief that federal sector Title VII cases will, unless their scope is carefully restricted, place unacceptable burdens on the judiciary. Petitioner submits that this kind of consideration is simply foreclosed by the legislative decision which Congress made in 1972 when it extended Title VII's judicial remedy to the federal sector:

> ". . . it should be remembered that the parts of the 1972 amendments involved in this case extended coverage to only approximately 2.6 million federal employees. They also extended coverage to an estimated 10.1 million state and local government employees and millions of additional private sector employees. Congress explicitly decided that the time and expense of *de novo* judicial fact-finding procedures for the latter were clearly worth the expected increase in fairness and accuracy of such fact-finding over administrative fact-finding, and the increase in respect which such decisions would be accorded. There is no indication that Congress believed that any burden created by federal employee litigation would, to the contrary, be undesirable in light of the similar laudable purposes which it serves." *Hackley* v. *Roudebush, supra,* 520 F.2d at 154 (footnotes omitted).

Accord, Sperling v. *United States, supra,* 515 F.2d at 483-4: "Those concerns, while real, are matters properly within the sphere of the legislature."

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[58] *But see, Hackley I, supra,* 360 F.Supp. at 1249 n.2 and text at n.2.

6. Finally, another argument which has sometimes been advanced as a reason for denying plenary judicial proceedings is that the savings in time afforded by a more restricted procedure would actually benefit federal sector plaintiffs because their complaints would be more expeditiously adjudicated.[59] But there is, of course, nothing to prevent the parties in a federal sector Title VII action from agreeing to submit the case for decision on the administrative record if they deem it appropriate to do so. Nor does the availability of plenary judicial proceedings in any kind of case relieve counsel of their obligation, once discovery has been conducted, to make a conscientious effort to stipulate as many facts as possible. Such an effort is always required both to simplify the court's process of decision, and to avoid burdening either the parties or the court with formal proof of facts which are clearly established by documentary or other evidence. In the final analysis, however, the response to arguments regarding the time that may be consumed in plenary judicial proceedings must be as follows:

> "Surely Congress intended that Title VII cases be expedited both in the agencies and in the courts. But more important, it wanted all vestiges of discrimination eradicated. To tell an aggrieved federal employee whose discrimination claim was rejected in an administrative proceeding that, since Congress wanted his claim expeditiously processed, he should be expeditiously denied the opportunity to present all relevant evidence pertaining to that claim is, to say the least, incongruous. Indeed, it is particularly incongruous to suggest that 'reasonable' discovery . . . is actually an evil to be avoided.
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> • • •
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> ". . . we simply fail to perceive what substantive policies of the Act, from the perspective of the federal employee who is aggrieved by his agency's or the CSC's treatment of his complaint, are defeated rather than advanced through a trial *de novo*. Avoidance of 'substantial delays' is no panacea if the product of speed is a hasty denial of justice. . . ." *Hackley* v. *Roudebush, supra,* 520 F.2d at 155-6 (footnote omitted).

[59] *Hackley I, supra,* 360 F.Supp. at 1252; *Haire* v. *Calloway, supra,* 10 EPD at p. ——, 11 F.E.P. Cases at 771-2.

F. The Issue in the Case at Bar Has Important Implications for Other Issues, Which Also Counsel in Favor of a Rule Providing for Plenary Judicial Proceedings.

No discussion of the issue of the nature and scope of judicial proceedings would be complete if it did not advert to other issues whose outcome will be strongly influenced if not directly controlled by this Court's decision in the case at bar. Foremost among these related issues is the question of the availability of class actions in federal sector Title VII cases.[60]

If "it was Congress' intent to provide an aggrieved federal employee with as full a panoply of procedural remedies in the district court as those afforded a private sector litigant,"[61] then class actions should be fully available in federal sector Title VII cases where the requirements of Fed.R.Civ.P. 23 are met.[62] On the

[60] For a discussion of some other related issues, *see* Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae.

[61] *Sperling* v. *United States, supra,* 515 F.2d at 481.

[62] *Hackley* v. *Roudebush, supra,* 520 F.2d at 151-3 n.177; *see also, e.g., Sylvester* v. *U.S. Postal Service,* 393 F.Supp. 1334 (S.D. Tex. 1975); *Chisholm* v. *U.S. Postal Service,* 9 EPD ¶ 10,212,

other hand, if federal sector Title VII case are not *de novo* proceedings, then there are very substantial grounds for doubting that class action treatment will be available in these cases. Thus it has been held that "federal employees cannot maintain class actions under Title VII" because "a class action . . . would require exploration of factual issues obviously beyond the record of a single employee" [63]; and that "[w]here there is review on the record and no trial *de novo,* there is no class action." [64]

The class action has been the backbone of Title VII's effectiveness in the private sector.[65] Individual, single-plaintiff cases such as the case at bar [66] are, of course, important to the parties involved, and they are also affected with a public interest.[67] But the major

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11 F.E.P. Cases 457 (W.D. N.C. 1975), *appeal pending,* 4th Cir. Nos. 75-2068, 75-2069; *Ellis* v. *Naval Air Rework Facility,* 10 EPD ¶¶ 10,257, 10,422 (N.D. Cal. 1975).

[63] *Pendleton* v. *Schlesinger,* 8 EPD ¶ 9598, at p. 5569, 8 F.E.P. Cases 853 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1929.

[64] *Spencer* v. *Schlesinger,* 374 F.Supp. 840, 844 n.6 (D.D.C. 1974), *appeal pending,* D.C. Cir. No. 74-1787; *see also, e.g., Eastland* v. *Tennessee Valley Authority,* 9 EPD ¶ 9927, at p. 6882 (N.D. Ala. 1975), *appeal pending,* 5th Cir. No. 75-1855.

[65] *E.g., Albemarle Paper Co.* v. *Moody,* 95 S.Ct. 2362 (1975); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

[66] *See also, e.g., McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973).

[67] *Albemarle Paper Co.* v. *Moody, supra,* 95 S.Ct. at 2370; *see also, Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968). It should be noted that unlike in the private sector, where the EEOC and the Attorney General have authority to bring court actions to enforce Title VII—and unlike in the state and local government sector, where the Attorney General has such authority—in the federal sector, the private plaintiff is the *only* party

impact of Title VII in terms of systematic reform of unlawfully discriminatory employment practices has been felt in class action cases. In such cases, the courts have held that a single plaintiff who has exhausted his administrative remedies may maintain an across-the-board class action on behalf of other members of his class who have not exhausted or even initiated the administrative process; that such a plaintiff may raise in his judicial complaint, on his own behalf and on behalf of the class he represents, any matters "like or related to" the allegations of his administrative charge; and that other members of the class who do not themselves have independent standing may properly be named as co-plaintiffs in the action, or receive relief as unnamed parties.[68] This Court has approved this general line of authority, and has held that backpay may be awarded on a class basis in such cases.[69]

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who can bring such an action, and the government's only involvement is as a defendant.

[68] *E.g., Wetzel* v. *Liberty Mutual Ins. Co.,* 508 F.2d 239 (3rd Cir. 1975), *cert. denied,* 421 U.S. 1011 (1975); *Barnett* v. *W. T. Grant Co.,* 518 F.2d 543 (4th Cir. 1975); *Oatis* v. *Crown-Zellerbach Corp.,* 398 F.2d 496 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968); *Miller* v. *International Paper Co.,* 408 F.2d 283 (5th Cir. 1969); *Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969); *Carr* v. *Conoco Plastics, Inc.,* 423 F.2d 57 (5th Cir. 1970); *Sanchez* v. *Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); *Gamble* v. *Birmingham Southern Railroad Co.,* 514 F.2d 678 (5th Cir. 1975); *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969); *Oubichon* v. *North American Rockwell Corp.,* 482 F.2d 569 (9th Cir. 1973).

[69] *Albemarle Paper Co.* v. *Moody, supra,* 95 S.Ct. at 2370 n.8.

These decisions have been informed by, and are consistent with the broad remedial purpose of Title VII. Their applicability to federal sector cases would be very seriously in question if this Court were to hold that such cases are not plenary judicial proceedings, but are instead intended to focus on the administrative record of the individual plaintiff's complaint. Only a ruling by this Court upholding the unitary structure of Title VII as it applies to federal defendants as well as all other defendants will preserve the vitality of the class action device in the federal sector. And on this question, as on the question presented in the case at bar, Congress has made its will known with clarity.[70]

G. The Posture of the Case at Bar Requires That the Judgment Below Be Reversed.

In the case at bar the examiner who conducted the administrative hearing on petitioner's complaint concluded that

[70] *Albemarle Paper Co.* v. *Moody, supra,* 95 S.Ct. at 2370 n.8; Section-by-Section Analysis of H.R. 1746, The Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7565 (Mar. 8, 1972), *History* at 1847: "In establishing the enforcement provisions under this subsection [706(f)(1)] and subsection 706(f) generally, it is not intended that any of the provisions contained therein shall affect the present use of class action lawsuits under Title VII . . . ."; *id.*, 118 Cong. Rec. 7564, *History* at 1844: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII"; *id.*, 118 Cong. Rec. 7566, *History* at 1851: "*Section 717(c) and (d)*—The provisions of sections 706(f) through (k), concerning private civil actions by aggrieved persons, are made applicable to aggrieved Federal employees or applicants for employment."

> ". . . a preponderance of the overall evidence justifies a conclusion that the selecting official discriminated against Complainant because of her sex in not selecting her for the GS-13 Section Chief position. The evidence does not indicate that Complainant's race influenced the decision not to select her for the position." (A.R. 34-5; Pet App. 16a).

The examiner recommended that petitioner be promoted immediately and retroactively to the position in question. (A.R. 19; Pet. App. 16a).

However, the Veterans Administration rejected the examiner's finding of discrimination, and stated that

> "The selecting official is entitled to make his selection from any of the candidates on a promotion certificate, whether or not the candidates are presented in rank order, based on his judgment of how well the candidates will perform in the particular job being filled, and, when relative, what their potential is for future advancement. Authority: Federal Personnel Manual, Chapter 335, subchapter 3, paragraph 3.7c. The record is absolutely void of any evidence or testimony in reference to any acts, words, or innuendos, discriminatory in nature, by the selecting official, relating to his selection from the certificate of eligibles furnished him." (A.R. 38; Pet. App. 20a).

The agency's decision was affirmed by the Civil Service Commission, which added reasons of its own to those given by the agency in support of its decision. (A.R. 3-8; Pet. App. 21a-29a).[71]

[71] Two of the reasons cited by the Commission cannot be considered to suport the agency's decision.

First, the Commission observed that the person selected over

The district court's decision in the government's favor contained no discussion of the facts of the case, no indication of why it had concluded that petitioner had not been discriminated against, and no explanation of why it had decided in this particular case to limit the judicial proceedings to a review of the administrative record. (R. 252-9; Pet. App. 30a-33a). The court of appeals did state its reasons for concluding that petitioner had not been discriminated against. (515 F.2d at 254; Pet. App. 38a-39a).[72] But it, like

petitioner had a "total score on the examination (167) [which] exceeded [petitioner's] by two points." (A.R. 3; Pet. App. 22a). In fact, there was no "examination" given. A rating of applicants was performed by an evaluation panel, in order to determine which applicants were to be designated as "highly qualified." (A.R. 159). Petitioner was one of the applicants so designated. (A.R. 19; Pet. App. 4a). There was no evidence that the interview panel or the adjudication officer (the selecting official) was made aware of the actual numerical ratings assigned by the evaluation panel, and there was affirmative evidence to the contrary. (*See*, A.R. 158-9, 177, 187, 224; 94-5, 99-100). Neither the Veterans Administration nor the selecting official cited the two-point difference in ratings as a justification for failure to select petitioner. (A.R. 36-9; Pet. App. 18a-21a; A.R. 56-69, 177-186).

Second, the Commission stated that "the selectee received a more favorable rating than the complainant with respect to ability to 'motivate, train, develop, and guide employees of varied backgrounds and skill levels effectively.' " (A.R. 6; Pet. App. 25a-26a). In fact, petitioner on two occasions received a one-point *higher* score than the selectee on this characteristic. (*Compare* A.R. 124 point 1(h) *with* A.R. 132, point 1(h); and *compare* A.R. 126, point 1(h) *with* A.R. 136, point 1(h)). The Commission seemed, inconsistently, to recognize this at a later point in its decision, where it stated that the selecting official "had previously concurred in assigning complainant a higher rating on ability to motivate employees." (A.R. 8; Pet. App. 28a).

[72] Included among these reasons was that the selectee had "a numerical score two points higher than [petitioner's] on a grading system that was not shown to have been discriminatory." (515

the district court, based its decision solely on a review of the administrative record. No testimony was heard in the district court; and petitioner was not permitted to engage in any discovery.

In the preceding portions of this argument, petitioner has set forth her reasons for believing that federal sector Title VII plaintiffs are entitled to engage in discovery pursuant to the Federal Rules of Civil Procedure, and to present testimonial and documentary evidence in a plenary judicial trial. If this argument is accepted, then a reversal of the decision below follows as a matter of course, since petitioner was deprived of the right to discovery and the right to present evidence beyond the administrative record. The summary judgment affirmed by the court of appeals cannot stand under ordinary Rule 56 standards as applied in cases where plenary judicial proceedings are afforded, because no discovery was permitted, and because even in the absence of discovery, triable issues of fact were manifest.

While a reversal follows, therefore, as a matter of law from the foregoing analysis, it is instructive to consider by way of illustration some of the more apparent defects in the review of the record which the court of appeals affirmed. A critical examination of the procedure followed at the administrative level and in the courts below reveals examples of a number of the inadequacies of any rule providing for less than plenary judicial proceedings. Beyond this, such an examination demonstrates that the judgment in respondents' favor in the case at bar does not withstand

F.2d at 254; Pet. App. 38a). As previously noted, this provides no support for a decision in respondents' favor. *See*, n.71, *supra*.

scrutiny even under a legal standard affording less than plenary judicial proceedings. Indeed, the judgment below is even unsupportable under the legal standard which the decision of the court of appeals itself set forth. That standard placed on petitioner—who had sought but been denied discovery, and who had prevailed before the only officer to hear oral testimony—the burden of demonstrating a need to present evidence beyond the administrative record. (515 F.2d at 255; Pet. App. 40a-41a). Even assuming *arguendo* the correctness of placing such a burden on petitioner, the court of appeals ignored crucial deficiencies in the administrative record in holding that there was no need for discovery and judicial evidentiary proceedings.

1. As the court of appeals recognized, there can be no dispute that petitioner established the four elements of a *prima facie* case of discrimination as set forth in this Court's decision in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973).[73] Since this showing shifted the burden to the respondents to articulate a legitimate, nondiscriminatory reason for petitioner's rejection, it is interesting to note that the agency did not call any witnesses or offer any documentary evidence at the administrative hearing, but simply rested on the investigative file which had been prepared at a prior stage in the administrative process. (A.R. 18; Pet. App. 3a; A.R. 46-7, 117). The agency's approach is perhaps understandable in light of the fact that the Civil Service Commission instructs its examiners that the concept of burden of proof does not apply to the discrimination complaint hearing

[73] *See,* 515 F.2d at 254; Pet. App. 37a: "Appellant is correct in asserting that she was entitled to an affirmative statement of nondiscriminatory reasons for the selection of another applicant."

process."[74] However, while this may explain the agency's casual attitude concerning its obligation to respond to petitioner's *prima facie* case, it also provides a striking illustration of the degree to which the administrative procedure fails to implement the order and allocation of proof to which this Court addressed itself in the *McDonnell Douglas* case.

2. Assuming *arguendo* that the respondents discharged their burden to present sufficient evidence of a "legitimate, nondiscriminatory reason" for petitioner's non-selection, petitioner was still to "be afforded a fair opportunity to show that [respondents'] stated reason for [her] rejection was in fact pretext." *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 802, 804. In this connection, one of petitioner's first acts after suit was filed in the district court was to notice the deposition of, and request production of documents by, the selecting official; and to notice the deposition of the person selected in preference to petitioner for the job in question. (R. 146-150). Since petitioner had represented herself at the administrative hearing, the selecting official had never been questioned by an attorney acting in her behalf. And the complaints examiner had denied petitioner's request to call as a witness at the administrative hearing the person selected for the job in question. (A.R. 118, 141, 144).

It was undisputed that petitioner was "highly qualified" for the position involved in the case at bar. Agency officials stated that it was very difficult to de-

[74] U.S. Civil Service Commission, *Discrimination Complaint Examiner's Handbook* (April, 1973), at pp. 53-4; *Hackley* v. *Roudebush,* 520 F.2d 108, 138 n.129 (D.C. Cir. 1975) (opinion of Wright, J.).

cide between petitioner and the selectee, that the interview panel was divided 2-1 on the question, and that petitioner would have been selected if the ultimate selectee had not been chosen. (*E.g.*, A.R. 65-6, 95, 159-160). The attorney who represented the government in the lower courts took the position that "here we have a situation where we have two people that had outstanding records, very worthy of being considered for promotion. . . . the affidavits and the testimony in the administrative record demonstrate it is a close question [as to who should have been selected]." (Tr. 13, Dec. 21, 1973). In these circumstances, the credibility of the selecting official's testimony concerning his reasons for failing to select petitioner was of central importance. The complaints examiner—the only officer to hear and observe the selecting official's testimony—found that the selecting official had discriminated against petitioner. The Civil Service Commission, in affirming the agency's rejection of this finding, relied heavily on the selecting official's testimony. (A.R. 5-8; Pet. App. 24a-28a). It seems particularly inconsistent with the district court's role as ultimate factfinder for it to have proceeded to decision without permitting the selecting official to be questioned by petitioner's attorney, and without observing the selecting official's testimony and making an independent judgment concerning his credibility.

Similarly, the fact that the hearing officer refused to call as a witness the person selected over petitioner for the job in question makes it particularly inexplicable that the district court proceeded to decision without at least granting petitioner's request to take the selectee's disposition. Central to the issue in this case were the relative qualifications of petitioner and

the selectee, and the validity or pretextuality of the asserted reasons for failing to select petitioner. One of petitioner's contentions—on which the hearing examiner, the agency, and the Civil Service Commission each expressed no opinion because of lack of sufficient evidence (A.R. 6, 30-31, 38; Pet. App. 13a, 20a, 26a)—was that the selectee did not prossess the necessary ability to read and interpret computer printouts. In addition, petitioner contended—and, according to the agency and CSC decisions, failed to prove (A.R. 5, 37-8; Pet. App. 19a, 24a-25a)—that the selectee was inferior to her in technical proficiency. It seems incongruous that petitioner—who had already made out a *prima facie* case of discrimination—could be charged with failure to prove that the selectee was less qualified than she. Not only was it more properly the respondents' burden to show that the selectee was more qualified than petitioner; in addition, petitioner was deprived of the opportunity to take the selectee's deposition or call him as a witness, so that she was unable to inquire directly into certain aspects of his qualifications. Moreover, the inability to question the selectee hampered petitioner's opportunity to explore whether any of his contacts with his superiors might give rise to an inference that he had been "preselected" for the position in question. (*Cf.*, A.R. 62, 178).

3. As this Court held in *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 804-5:

> "Other evidence that may be relevant to any showing of pretext includes . . . [the defendant's] general policy and practice with respect to minority employment. [Footnote omitted.] On the latter point, statistics as to [the defendant's] employment policy and practice may be helpful to a determination of whether [the defendant's action]

> in this case conformed to a general pattern of discrimination. . . ."

In the case at bar, "review on the record" operated to impair substantially petitioner's ability to adduce the kind of evidence to which the above passage from *McDonnell Douglas* refers.

At the administrative hearing, no documentary exhibits (other than the investigative file) were offered by the parties. (A.R. 18). The hearing examiner took some initiative to obtain additional documents; but information from the personnel files so obtained was sanitized for purposes of the examiner's decision, and the actual personnel files were not available to petitioner or the district court. (A.R. 18). Of course petitioner, not being an attorney, could not have been expected to attempt at the administrative level to engage in the kind of discovery which is typical in Title VII litigation.[75] But in any case, the administrative process does not generally provide for anything comparable to discovery under the Federal Rules of Civil Procedure, and nothing comparable to such discovery occurred at the administrative level in the case at bar.

If discovery had been permitted by the district court, a number of possible avenues of inquiry would have been open. For example, detailed exploration of relevant employment statistics could have been undertaken. In this connection, it is ironic that the court of appeals, which held that there was no need to go beyond the administrative record, simultaneously held as follows:

> "Three persons, all male, were promoted from grade 12 to grade 13 during the 18 months in which

[75] *See, e.g., Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973).

> the supervisor whose decision was challenged had the principal responsibility in such promotions. There was no evidence, however, to rebut the supervisor's statement that those promoted were the best qualified. There was no evidence that qualified women even competed for these promotions, much less that any qualified woman was rejected in favor of a less qualified man." 515 F.2d at 254; Pet. App. 38a.

It seems inexplicable that the court of appeals failed to note that if petitioner had been permitted to engage in discovery, the kind of evidence which it felt was missing may well have been forthcoming. Even the Civil Service Commission considered it relevant to observe in its decision that "[s]tatistically, it is clear that as a black, and even more so as a female, complainant was in a category least likely to be promoted to a position at grade GS-9 or above." (A.R. 7; Pet. App. 27a). Discovery would have enabled petitioner, consistently with *McDonnell Douglas,* to have explored whether a general policy or practice of discrimination was lurking behind these statistics.

One starting point for such discovery might have been the analyses contained in the agency's equal employment opportunity plan, which is required by statute and regulation,[76] but which was not a part of the administrative record. Other avenues that would have been worthy of detailed exploration include (a) the circumstances surrounding a prior racial discrimination complaint involving the same selecting official, in which a clerk complained about a promotion and "[w]e were later advised to promote her" (A.R. 185); (b) the reasons why "[w]hen we hire outside, we go

[76] 42 U.S.C. § 2000e-16(b); 5 C.F.R. §§ 713.203, 713.302.

to the register and I do not recall interviewing any non-Caucasians. The minority people just aren't appearing on the register" (A.R. 185) [77]; and (c) the circumstances surrounding petitioner's allegations of a general pattern or practice of discrimination (*e.g.*, A.R. 41, 106-109, 116, 161, 163, 165, 174-5, 275-6).[78]

The foregoing is intended only to suggest some possible lines of inquiry. Moreover, it may be that evidence uncovered by discovery would not have persuaded the district court to find in petitioner's favor. The point is, however, that petitioner was deprived of the right to conduct discovery and to attempt to make an important kind of showing which this Court's opinion in *McDonnell Douglas* contemplates.

4. The hearing examiner found that petitioner had been discriminated against on the basis of her sex, but that no racial discrimination had been shown. The exclusion of certain requested witnesses at the administrative hearing would not have been of great significance had the agency accepted the examiner's decision based on sex discrimination. But since it did not, and

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[77] *See, Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 95 S.Ct. 2362 (1975); *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975).

[78] In this connection, it should be noted that it was the hearing examiner—not petitioner—who reduced the scope of the inquiry to six numbered allegations. (A.R. 20-21; Pet. App. 4a-5a). The agency and the CSC then adopted the examiner's narrow definition of petitioner's contentions. (A.R. 4-5, 36-7; Pet. App. 18a-19a, 23a-24a). A review of the record citations in the text will show that petitioner's allegations included claims of an across-the-board pattern or practice of discrimination against blacks as a class and females as a class. As noted in *McDonnell Douglas*, facts bearing on such allegations are also probative in an individual, single-plaintiff case.

since the lower court's confined themselves to a review of the administrative record, it is of central importance that the hearing examiner refused to call 15 of the 24 witnesses whom petitioner had requested. (A.R. 118, 141-5). Some of these witnesses would have testified to the existence of a pattern of race or sex discrimination within the agency, or to instances of race or sex discrimination which they themselves had suffered. (A.R. 143-5, 189-190, 191-3, 194-6, 197-9, 204-5). Some others had been requested by petitioner to show how non-minority employees were treated more favorably than blacks and females. (A.R. 143-5). The examiner's basis for excluding all of these witnesses—that "they do not appear to have direct knowledge related to [petitioner's] non-selection for the position of Section Chief" (A.R. 141; *see also,* A.R. 118)—was plainly inconsistent with the broad standard of relevancy which this Court recognized in the *McDonnell Douglas* case.

Moreover, if the kind of discovery suggested above had been permitted, it might well have led petitioner to additional witnesses beyond those whom she had attempted to call at the administrative hearing. Thus in two crucial respects—the examiner's exclusion of witnesses, and the lack of discovery and compulsory process—the procedure followed at the administrative level and in the district court was highly prejudicial to petitioner's right to "a full and fair opportunity" to adduce all competent evidence. *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 805.

5. Finally, it is no reflection on petitioner, a lay person, to suggest that her examination of some of the witnesses who did testify at the administrative hearing

was not as thorough or effective as the kind of examination that an experienced attorney armed with documentary evidence might be able to conduct. (*E.g.*, A.R. 56-62, 67, 69-73). This does not, of course, necessarily mean that all or even most of the witnesses who testified at the administrative hearing would need to be recalled in plenary judicial proceedings. But petitioner was deprived of all opportunity to have her attorney examine witnesses either by deposition or at a trial. While petitioner had the right to be represented by an attorney at the administrative level if she had been prepared to bear the expense involved, there is no provision for appointment of an attorney at the administrative level, and no provision for recovery of attorneys' fees by a complainant who prevails at the administrative level and does not need to file a court action. Of course, once a civil action is filed under Title VII, appointment of an attorney, and recovery of attorneys' fees, are provided for by the statute. 42 U.S.C. §§ 2000e-5(f)(1), 2000e-5(k). That important aspect of the statutory scheme, however, provides little comfort if the attorney's hands are tied by a rule of law which denies the right to plenary judicial proceedings, and which rivets the attention of the parties and the court to the administrative record.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for plenary judicial proceedings.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

JEWELL D. CHANDLER, PETITIONER

v.

RICHARD L. ROUDEBUSH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1599

JEWELL D. CHANDLER, PETITIONER

v.

RICHARD L. ROUDEBUSH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34a-41a) is reported at 515 F. 2d 251. The opinion of the district court (Pet. App. 30a-33a) is not officially reported; it is unofficially reported at 7 EPD ¶ 9139.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975. The petition for a writ of certiorari was filed on June 19, 1975, and was granted on October 6, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal employee who brings a civil action under Section 717 of the Civil Rights Act of 1964, following an administrative determination of his employment discrimination claim, is entitled to a trial *de novo* in the district court rather than a review of the administrative decision on the administrative record.

STATUTE AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. IV) 2000e *et seq.*, is set forth in Appendix A to this brief, *infra,* pp. 1a–18a. Portions of the statute that were added or amended in 1972 appear in italics.

The Civil Service Commission's Equal Opportunity Regulations, 5 C.F.R. Part 713, are set forth in Appendix B to this brief, *infra,* pp. 19a–52a.

STATEMENT

Petitioner, a black female, was employed in 1972 as a GS–12 grade level Claims Examiner in the Los Angeles Regional Office of the Veterans Administration. She had begun working for the agency in 1966 as a GS–7 level Claims Clerk and, after several grade promotions over the next three years, was appointed a Claims Examiner in March 1971. In August 1972, petitioner applied for a promotion to a GS–13 Supervisory Claims Examiner (Section Chief) position (A.R. 3).[1] Following a lengthy and thorough selection

[1] "A.R." refers to the Administrative Record.

process (A.R. 177–179), in which petitioner was one of several "highly qualified" candidates interviewed for the position and one of three finalists, the selecting official, Martin Holland, chose a Filipino-American male, Inocentes Dineros, who had been in the division in which the vacancy occurred for approximately 13 years and had been a GS–12 Claims Authorizer for five years.

On September 25, 1972, following the selection of Mr. Dineros, petitioner filed an administrative complaint with the Veterans Administration alleging race and sex discrimination (A.R. 269). After an extensive investigation as required by Civil Service regulations, during which sworn statements were taken from some 20 persons (A.R. 168–225), the investigative report submitted to the agency's Equal Employment Opportunity Officer (App. 24–44) concluded that the evidence supported neither the allegation of race and sex discrimination against petitioner individually (App. 29–31), nor a finding of general race and sex discrimination within the Adjudication Division of the Regional Office (App. 33). The report did conclude, however, that certain personnel practices should be changed in order to alleviate feelings among minority employees that they were subject to discrimination (App. 41).

As required by the regulations, petitioner was furnished a copy of the investigative file and an opportunity for informal adjustment of her complaint.

An adjustment was not achieved, however, and petitioner was notified of her right to an administrative hearing, which she requested (A.R. 154–155). On application of the Veterans Administration, the Civil Service Commission promptly appointed an independent complaints examiner from another agency to conduct the hearing (A.R. 153). Petitioner was notified by the examiner that at the hearing she could be represented by an attorney or other person of her choice, that she could submit the names and titles of any witnesses she wished to call, and that specific reasons would be given for the failure to summon any witness she had so specified (A.R. 150–151). Petitioner responded that she would represent herself because of her familiarity with the policies and procedures involved, and requested that 24 designated witnesses be called (App. 19–23). The complaints examiner determined not to call 15 of these witnesses because they did not appear to have direct knowledge of petitioner's non-selection and because information about the general atmosphere out of which the complaint arose (the expected subject of testimony by several of petitioner's witnesses) had already been sufficiently developed in the complaint file (App. 16–18).

Ten witnesses testified under oath at the two-day hearing held in January 1973.[2] After a Veterans Administration personnel officer had sketched the agen-

[2] Petitioner testified and presented seven witnesses, and the complaints examiner called two witnesses. The agency representative called no further witnesses, relying heavily upon cross-examination and the sworn statements in the investigative file (A.R. 18).

cy's promotion procedures and criteria (A.R. 47–56), the selecting official and two other members of the interviewing panel testified about the relative qualifications of petitioner, the selectee, and another highly qualified applicant. The panel agreed that Mr. Dineros was not as familiar with one area of expertise as petitioner (education claims), but two of the three panel members, including the selecting official, considered Mr. Dineros generally more qualified, in particular because of his experience and ability to motivate people (A.R. 56–69, 93–103). Finally, five other employees testified about the capabilities of petitioner and Mr. Dineros, and petitioner herself testified. All witnesses were subject to direct, cross, and redirect examination by both the agency representative and the petitioner, as well as examination by the complaints examiner.

Subsequent to the hearing, the complaints examiner submitted findings and recommendations as required by Civil Service regulations (A.R. 16–35; Pet. App. 1a–17a). The examiner found that a preponderance of the evidence justified the conclusion that petitioner had been discriminated against on the basis of sex (but not of race) in not being selected for the GS–13 Section Chief position. Specifically, the examiner relied on findings that:

1. Petitioner had demonstrated a greater technical proficiency in three main areas of responsibility (education, pension, and compensation claims) than Mr. Dineros;

2. Petitioner had demonstrated a greater potential to perform in a supervisory capacity than Mr. Dineros;

3. The selecting official had not sufficiently considered petitioner's ability to read computer printouts;

4. Mr. Dineros' law degree did not justify his selection over petitioner, since most Section Chiefs did not have law degrees and petitioner had completed courses established for employees without such degrees; and

5. The selecting official preferred males in supervisory positions, as demonstrated by his previous selection of three men for such positions and his use of the words "he" and "his" in describing the qualifications of a Section Chief. The examiner recommended that petitioner be promoted retroactive to September 17, 1972.

The complaints examiner's decision and the hearing record were transmitted to the Veterans Administration, which was authorized by regulation to adopt, reject, or modify the recommended decision (see p. 60, *infra*). On March 21, 1973, the Acting Assistant General Counsel of the agency determined that the record failed to support petitioner's allegations of either sex or race discrimination (A.R. 36–39; Pet. App. 18a–21a). While agreeing that petitioner had shown a superior ability to read computer printouts and that the selecting official could not justify the choice of Mr. Dineros on the basis of his law degree, the agency rejected the examiner's findings that Mr. Dineros had not demonstrated technical proficiency in

the areas of education, compensation, and pension claims, and that the record indicated a predisposition on the part of the selecting official for males in supervisory positions.

Petitioner then filed a timely appeal of the agency decision to the Civil Service Commission Board of Appeals and Review (subsequently redesignated as the Appeals Review Board). On July 18, 1973, upon review of the entire complaint file and written representations submitted by petitioner, the Board affirmed the agency decision (A.R. 3–9; Pet. App. 21a–29a). After analyzing petitioner's response to the agency's treatment of each of her allegations and examining the statistical picture of the Veterans Administration's Adjudication Division furnished by the initial investigation, the Board concluded (A.R. 8; Pet. App. 28a):

> To summarize, the main evidence that the selecting official discriminated against complainant in not selecting her over the male selectee is the inconsistency of his explanation that the main reason for the selection was his belief in the ability of the selectee to motivate employees whereas he had previously concurred in assigning complainant a higher rating on ability to motivate employees. The Board notes, however, that on the whole blacks and women have fared relatively well in promotions received in the division, and that there are two white female GS–13 Section Chiefs, one of whom received her position before the selecting official was as-

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> signed to his present position, but the other of whom was reassigned laterally with the concurrence of the person acting as selecting official for the promotion in question.
>
> In view of the foregoing, the Board finds that the evidence of record does not support a finding that the agency's failure to promote the complainant resulted from discrimination on the basis of race or sex.

Within 30 days after receiving notice of the Commission's decision, petitioner filed this action in the United States District Court for the Central District of California under Section 717(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. IV) 2000e–16(c). On December 27, 1973, the court granted the government's motion for summary judgment (Pet. App. 30a–33a). Adopting the scope of judicial review expressed in *Hackley* v. *Johnson,* 360 F. Supp. 1247 (D. D.C.) (subsequently reversed *sub nom. Hackley* v. *Roudebush,* 520 F. 2d 108 (C.A. D.C.)), the court found that "the absence of discrimination is firmly established by the clear weight of the administrative record and hence plaintiff is not entitled to any relief" (Pet. App. 33a).

The court of appeals affirmed (515 F. 2d 251; Pet. App. 30a–41a). After conducting its own examination of the administrative record, that court agreed with the district court that "other than the facts that appellant was female and that the person promoted was male, there was no evidence to support appellant's assertion of sex discrimination" (515

F. 2d at 254; Pet. App. 38a). The court of appeals further rejected petitioner's argument that she was entitled to a trial *de novo* in the district court of the issue of discrimination that had been explored in the administrative proceedings (515 F. 2d at 255; Pet. App. 40a–41a):

> Here, the district court was presented with a verbatim transcript of a hearing and a comprehensive civil service review. There was no material flaw in the administrative record on its face; and nothing of substance in appellant's challenge to the administrative proceedings. There was nothing before the district court to indicate that a useful purpose would be served by having a trial de novo. * * *
>
> * * * * *
>
> Where the administrative record affirmatively shows, as it did here, that the challenged personnel action was based upon nondiscriminatory reasons; and where, as here, the record on its face appears to be the product of a fair and impartial hearing; and where, as here, the appellant fails to point out a prejudicial defect in procedure or evidentiary deficits that should be remedied in court, the district court commits no error in deciding the case on the administrative record.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 717(c) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 112, 42 U.S.C. (Supp. IV) 2000e–16(c), provides that a federal employee who claims

to have been discriminated against in employment may bring a civil action in the United States District Court following the timely presentation of his claim to the appropriate administrative authorities. Passage of the 1972 Amendments has resulted in voluminous litigation across the country on the issue of the proper scope of review to be applied by district courts to these administrative determinations.[3] The courts of appeals, like the district courts, have arrived at widely divergent views. The Third, Seventh, and District of Columbia Circuits have held that federal employees are entitled as of right to a trial *de novo* in the district court. *Sperling* v. *United States,* 515 F. 2d 465 (C.A. 3), pending on petition for a writ of certiorari, No. 75–247; *Caro* v. *Schultz,* 521 F. 2d 1084 (C.A. 7), pending on petition for a writ of certiorari *sub nom. Simon* v. *Caro,* No. 75–784; *Hackley* v. *Roudebush,* 520 F. 2d 108 (C.A. D.C.). The Eighth, Ninth, and Tenth Circuits, on the other hand, have held that federal employees are not generally entitled to trials *de novo. Haire* v. *Calloway,* C.A. 8, No. 74–2004, November 17, 1975; *Chandler* v. *Johnson,* 515 F. 2d 251 (C.A. 9) (the instant case); *Salone* v. *United States,* 511 F. 2d 902 (C.A. 10), pending on petition for a writ of certiorari, No. 74–1600.

It is our position that in the ordinary case brought under Title VII, such as the present one, there is no

[3] Well over 50 district court decisions, varying widely in result, have been reported. See, *e.g., Fisher* v. *Brennan,* 384 F. Supp. 174 (E.D. Tenn), affirmed, 517 F. 2d 1404 (C.A. 6); *Ficklin* v. *Sabatini,* 383 F. Supp. 1147 (E.D. Pa.); *Spencer* v. *Schlesinger,* 374 F. Supp. 840 (D. D.C.); *Handy* v. *Gayler,* 364 F. Supp. 676 (D. Md.) (trial *de novo* not required; substantial evidence review); *Guilday* v. *Department of Justice,* 385 F. Supp. 1096 (D. Del.); *McLaughlin* v. *Callaway,* 382 F. Supp. 885 (S.D. Ala.); *Eastland* v. *TVA,* 9 EPD ¶9927 (N.D. Ala.); *Thomas* v. *Department of State,* 8 EPD ¶9622 (D. D.C.) (trial *de novo* not required if administrative record affirmatively establishes an absence of discrimination by the clear weight of evidence); *Griffin* v. *United States Postal Service,* 385 F. Supp. 274 (M.D. Fla.); *Jackson* v. *Civil Service Commission,* 379 F. Supp. 589 (S.D. Texas); *Henderson* v. *Defense Contract Administration Services Region,* 370 F. Supp. 180 (S.D. N.Y.); *Robinson* v. *Klassen,* 9 EPD ¶9954 (E.D. Ark.); *Foster* v. *Civil Service Commission,* 9 EPD ¶9887 (S.D. Texas) (trial *de novo* required).

justification for according the plaintiff an absolute right to a judicial trial *de novo* of the factual issues determined in the administrative proceedings, without regard to the fairness or completeness of those proceedings. It is a basic principle of administrative law that, "in the absence of specific statutory authorization, a *de novo* review is generally not to be presumed." *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 619, n. 17. See *Camp* v. *Pitts,* 411 U.S. 138, 141–142; *United States* v. *Carlo Bianchi & Co., Inc.,* 373 U.S. 709, 715. The language of the 1972 Amendments to the Civil Rights Act is silent as to the type of review that the courts must provide in federal Title VII actions, and certainly cannot be interpreted as a specific authorization of trials *de novo.*

Petitioner's heavy reliance on the legislative history to supply the authorization lacking in the statute's

terms ignores the context in which statements were made and places unwarranted weight upon portions of floor debate that concerned issues unlike those presented here; the few, isolated excerpts of legislative history that specifically address the scope of judicial review offer support for both sides. Indeed, the key item in petitioner's analysis of the legislative history—a sentence in the Senate Committee Report stating that federal employees under proposed amendments to Title VII were to enjoy the same rights in court as private employees—was part of a discussion of a Senate bill that would generally have limited judicial review of private discrimination complaints to a determination of whether an administrative order was supported by substantial evidence.

Our main disagreement with petitioner and *amicus curiae,* however, lies in their fundamental assumption that Congress intended the central role in federal Title VII enforcement to be played by the courts. This assumption is belied by the language of Section 717, which not only requires federal employees to initiate their discrimination complaints in an administrative proceeding and gives the agencies and Civil Service Commission broad remedial authority, but also affirmatively directs the Commission to eliminate federal employment discrimination by a program of ongoing review of departments and agencies and by mandatory enforcement powers. Congress, by deliberately continuing the primary responsibility of the agencies and the Civil Service Commission in federal personnel

EEO matters, recognized that the proper resolution of such grievances could best be achieved, not by isolating them from other employee and personnel considerations, but by adjudicating them in light of the more general obligation to maintain a merit system in federal employment and with the benefit of the substantial expertise accumulated in the Commission's enforcement of that system over the past 90 years.

Thus, while the legislative history clearly indicates a congressional intent to accord federal employees relief from employment discrimination that substantially approximates the relief available to workers in the private sector, the statutory scheme devised for enforcing Title VII rights in federal employment differs significantly from that applicable to employees in the private sector. Unlike the Equal Employment Opportunity Commission (EEOC), which investigates but cannot adjudicate charges of private employment discrimination, the Civil Service Commission is fully empowered to adjudicate federal discrimination complaints after formal evidentiary proceedings and to award complete relief, including retroactive promotion and back pay.

Moreover, the Equal Opportunity Regulations of the Civil Service Commission, 5 C.F.R. 713.201 *et seq.*, as revised to implement the 1972 Amendments, were specifically designed to establish a strong and reliable system of administrative complaint processing by providing for the fair and expeditious resolution of discrimination claims, while giving a complainant

significant procedural rights and safeguards. Because of these crucial distinctions, *de novo* judicial review of discrimination allegations—an essential ingredient of effective Title VII enforcement in the private sector, where administrative proceedings are not designed to adjudicate the Title VII claim and are informal, procedurally deficient, and incomplete, see *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792—would be inappropriate in the federal sector, where employees can obtain full benefits under the Civil Rights Act by court review of the procedural fairness of and the evidentiary and legal bases for the administrative determination. This parallel, equivalent procedure for the enforcement of federal Title VII rights is fully consistent with the repeated legislative pronouncement that federal employees should enjoy the same statutory protection from employment discrimination as private workers.

There are also strong policy reasons for construing Section 717, in the ordinary case, as authorizing judicial review of the administrative record rather than a trial *de novo*. A contrary conclusion would lead to unnecessary delay in the resolution of employment discrimination claims (a result in stark conflict with the intent of Congress), would impair the integrity and retard efforts at improvement of the administrative process, would encourage litigants to belittle the societal and systemic importance of an administrative resolution of their grievances, and would unnecessarily burden the federal judicial system with duplicative and wasteful trials. While such policy considerations may be immaterial where Congress has clearly spoken, they should be determinative in the resolution of the present case. The administrative procedure set forth in the regulations of the Civil Service Commission is fair and fully protects the complaining employee's legitimate interest. If an error of law occurs in the administrative process, it can of course be corrected by the reviewing court; similarly, if, for reasons of structural inadequacy, the administrative record appears incomplete or is otherwise procedurally or substantively deficient, the court possesses the discretion to remedy the defect by supplemental proceedings, including a plenary judicial trial in appropriate cases. We fully recognize that additional proceedings may be necessary, for example, when suit is brought after the agency has delayed more than 180 days without holding an evidentiary hearing or when proof of the complainant's grievance is dependent upon the testimony of a non-governmental employee who cannot be compelled by the complaints examiner to appear at the administrative hearing. We disagree, however, with petitioner's contention that these infrequent exceptions should dictate the general rule.

In all events, there is no justification for granting every federal Title VII complainant a trial *de novo* without regard to the fairness or completeness of the administrative determination of his claims, thereby rendering the administrative proceedings mandated by Congress little more than an inconsequential dress rehearsal for a subsequent court action.

ARGUMENT

SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT GRANT FEDERAL EMPLOYEES WHO HAVE BEEN ACCORDED AN ADMINISTRATIVE HEARING THE RIGHT TO A DISTRICT COURT TRIAL *DE NOVO* OF THEIR EMPLOYMENT DISCRIMINATION CLAIMS, AND PETITIONER'S CLAIMS WERE PROPERLY DETERMINED ON THE BASIS OF THE ADMINISTRATIVE RECORD

A. THE LANGUAGE AND STRUCTURE OF THE ACT DO NOT MANDATE A TRIAL *DE NOVO*

Section 717(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. IV) 2000e–16(a), pledges the federal government to undertake all personnel actions [4] affecting employees or applicants for employment "free from any discrimination based on race, color, religion, sex, or national origin." Section 717 (b) assigns primary enforcement responsibilities for Section 717(a) to the Civil Service Commission, through annual review and approval of equal employment opportunity plans submitted by each federal department and agency and by adjudication of appeals by aggrieved federal employees from adverse department or agency decisions. To carry out its functions under Section 717(a), the Commission is expressly empowered by Section 717(b) to grant "appropriate remedies, including reinstatement or hiring of employees with or without back pay," and to issue rules, regulations, orders and instructions.

[4] Aliens employed outside the limits of the United States, employees of the General Accounting Office, and employees of the Government of the District of Columbia and of the legislative and judicial branches who do not hold positions in the competitive service, were excluded from the Act's coverage.

The Act also authorizes employees unsatisfied by the administrative resolution of their complaint to file a civil action in the United States District Court. Sections 717(c) and (d) provide:

> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit * * * or by the Civil Service Commission upon an appeal * * * or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal * * * until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.
>
> (d) The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Prior to instituting the civil action in this case, petitioner fully pursued her administrative remedies under the Act, including a detailed investigation and attempts at adjustment of her complaint by the Veterans Administration, a thorough evidentiary hearing before an impartial complaints examiner, and an appeal to the Civil Service Commission. In the proc-

ess, a complete administrative record of petitioner's claim was compiled. In such circumstances, nothing in the language of the Act mandates a trial *de novo* of the identical claim in the district court.[5]

The provision in Section 717(c) for a "civil action" in the district court, on which petitioner places substantial weight (Br. 25–29), certainly does not indicate that a trial *de novo* is required. The Federal Rules of Civil Procedure authorize only one form of action, termed a "civil action," in suits of a civil nature in the United States District Court. Rule 2, Fed. R. Civ. P. Accordingly, causes of action in the district courts are properly denominated "civil actions" by Congress even when substantial evidence review of an agency determination is clearly mandated. See, *e.g.*, Social Security Act, of 1935, 49 Stat. 624, as amended, 42 U.S.C. 405(g) and Section 1878 (f)(1) of the Act, as added by 86 Stat. 1422, and amended by Pub. L. 93–484, 88 Stat. 1459, 42 U.S.C. (Supp. IV) 1395(f)(1).[6] Moreover, when Congress

[5] We discuss the situation where an agency has not taken final action prior to the filing of suit, or where a full administrative record has not been developed, *infra*, p. 66.

[6] This also answers *amicus*' contention (Br. 8, n. 7) that significance should attach to the statute's use of the term "civil action" rather than "petition for review." In a similar vein, the District of Columbia Circuit has stated that "if review of the administrative record was intended, we doubt that Congress would have placed jurisdiction in the District Courts rather than in the Courts of Appeals." *Hackley* v. *Roudebush*, *supra*, 520 F. 2d at 121. But the district courts commonly review administrative proceedings, both where such review is explicitly mandated by statute, as in Social Security cases (see 42 U.S.C. 405(g)), and where it is not, as in judicial review of federal personnel actions not arising under Title VII. See, *e.g.*, *Polcover* v. *Secretary of Treasury*, 477 F. 2d 1223, 1225 (C.A. D.C.), holding that "although cast in the mold of original actions in the district court," federal personnel cases "are disposed of on the basis of the administrative record and should be governed by the principles generally applicable to judicial review of administrative action." See also *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 227; *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 443. Contrary to the court of appeals' assertion that review in the district court, rather than in an appellate court, serves "'no viable purpose,'" *Hackley* v. *Roudebush*, *supra*, 520 F. 2d at 121, n. 49, district court review facilitates supplementary evidentiary proceedings in those instances when the administrative record is incomplete. See *infra*, pp. 66–67. In addition, as Professor Jaffe has noted, district court venue often encourages review because the typical plaintiff in certain types of actions (such as actions under Title VII) is a person of modest means. Jaffe, *Judicial Control of Administrative Action* 158 (1965).

has intended the courts to conduct a *de novo* proceeding following administrative action, normally it has explicitly so indicated. See, *e.g.*, Consumer Product Safety Act, 86 Stat. 1217, 15 U.S.C. (Supp. IV) 2059(e)(2); Food Stamp Act, 78 Stat. 707, 7 U.S.C. 2022(c); Perishable Agricultural Commodities Act, 46 Stat. 534, as amended, 7 U.S.C. 499g(c). The absence of such language here is in itself strong evidence of legislative intent not to require *de novo* review in every situation. Cf. *Consolo* v. *Federal Maritime Commission*, *supra*, 383 U.S. at 619, n. 17; *United States* v. *Carlo Bianchi & Co., Inc.*, *supra*, 373 U.S. at 715.

Petitioner's principal contention concerning the language of the Act is that a trial *de novo* is virtually compelled by Section 717(d), which states that federal employee civil actions are to be governed, "as applicable," by the provisions of Sections 706(f) through (k), which apply to private sector actions

under Title VII. Since private litigants seeking to enforce Title VII rights are entitled to a trial *de novo* in the district court, see *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, petitioner asserts that the same result must follow from the incorporation by reference into Section 717 of the provisions of Section 706. We disagree.

None of the provisions of Sections 706(f) through (k) confers, either explicitly or by necessary implication, a right to a trial *de novo,* and none of them is inconsistent with the construction we suggest. Sections 706(f)(1) through (3) contain jurisdiction and venue provisions and terms relating to the EEOC that are applicable only to state, local government, or private employees, and authorize court appointment of an attorney for the plaintiff and waiver of costs; Sections 706(f)(4) through (5) require the district court to "hear and determine" the case expeditiously—a requirement that no more indicates a trial *de novo* than it does a hearing on a summary judgment motion.[7] See Rule 56(c), Fed. R. Civ. P.

Section 706(g) empowers the district court to enjoin discriminatory practices and to order appropriate af-

[7] While Section 706(f)(5) authorizes the district court to appoint a master if the case has not been scheduled "for trial" within 120 days after issue has been joined, that provision does not purport to require a trial *de novo*, or even a trial, in every case. "As applicable" to Section 717 proceedings, that provision could be utilized where a trial would be appropriate because of failure by the agency to act upon an administrative complaint or where supplementary evidentiary proceedings are necessary (see p. 66, *infra*).

firmative relief, including reinstatement or hiring of employees with back pay; Section 706(h) relieves the district court in Title VII cases of the restrictions imposed by the Norris-LaGuardia Act, Sections 1–15, 47 Stat. 70, 29 U.S.C. 101–115, on the issuance of injunctions and restraining orders; Section 706(i) authorizes the EEOC to institute court proceedings, in its discretion, to compel compliance with court orders; Section 706(j) provides for appeal to the United States court of appeals under the normal rules of 28 U.S.C. 1291, 1292; and Section 706(k) allows the district court to award attorney's fees to the prevailing party, including an award of costs against the United States. Thus, these sections, incorporated by reference "as applicable" into Section 717, are not the source of a right of trial *de novo* for private litigants under Title VII and, accordingly, confer no such right in federal employee actions.[8]

[8] The legislative history indicates that, in incorporating Sections 706(f) through (k) into the federal employment provisions, Congress was mainly concerned with the attorney's fee and costs provisions. Senator Javits sought to amend an amendment of Senator Dominick (which was subsequently rejected) that, *inter alia*, would have removed the incorporation by reference from the Senate bill. In urging that the incorporation by reference be retained, Senator Javits remarked:

> If you refer to those provisions, insofar as they are applicable, you find that the main point is that where the complainant is suing in court, you have arrived at the stage of the proceeding where he has that remedy, and in such circumstances as the court may deem just, the court may appoint an attorney for the complainant and authorize the commencement of the action without the payment of fees, costs, or security.

118 Cong. Rec. 954 (1972); Legislative History at 868, ("Legislative History" refers to Legislative History of the Equal Employ-

Indeed, if petitioner and the District of Columbia Circuit are correct in asserting that the language of Section 706 "unequivocally accord[s] private sector litigants the right to a trial *de novo*," *Hackley* v. *Roudebush, supra*, 520 F. 2d at 120, this Court could have rested its decisions in *McDonnell Douglas Corp.* v. *Green, supra,* and *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, on the commands of the statutory language of Title VII rather than on a practical determination that the proceedings urged as substitutes for district court trials in those cases—EEOC investigation and attempted conciliation on the one hand and union grievance arbitration on the other—were inadequate to secure the rights granted by the Act. These decisions, however, are not based on the language of Section 706—and in particular not on subsections (f) through (k). As we show *infra* (see pp. 51–54), the crucial findings in *McDonnell Douglas Corp.* and *Alexander* regarding the substantive and procedural inadequacy of administrative and arbitral adjudication of private employment discrimination

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ment Opportunity Act of 1972, 92d Cong., 2d Sess. (Comm. Print 1972), prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare.) In agreeing to Senator Javits' amendment to his amendment, Senator Dominick stated:

> The amendment to strike the language was included because the language to be struck was thought to be inappropriate to the specialized grievance procedures adopted in committee for Federal employees. A closer reading of sec. 706(g) [*sic*, should be (q)] through (w) does indicate that *language for providing attorney's fees and waiving court costs are applicable.*

118 Cong. Rec. 956 (1972) (emphasis added); Legislative History at 872.

claims are inapplicable to the elaborate federal administrative remedial system established under Section 717.

Finally, petitioner contends that the Act's apparent authorization of a civil action prior to the completion of federal administrative proceedings inevitably supports her conclusion that a trial *de novo* is required in the district court. Under Section 717(c), an aggrieved employee is required initially to file his claim with the department or agency that has allegedly discriminated against him. If the final decision by the department or agency is adverse, the complainant has a right of appeal to the Civil Service Commission. Alternatively, he may, within 30 days of his receipt of notice of the department or agency's final decision, file a civil action directly without appealing to the Commission. If the employee does appeal to the Civil Service Commission, he may also bring a civil action within 30 days after receiving notice of the Commission's final decision. In addition, the complainant is authorized to file a civil action if, after the expiration of 180 days from the filing of his initial charge or the filing of his administrative appeal, the department or agency, or the Civil Service Commission, has not yet taken final action on the complaint or the appeal.

We have argued in a related case that an employee must exhaust his administrative remedies under the Act before he may resort to court review. Brief for the Respondents, *Brown* v. *General Services Administration*, pending on writ of certiorari, No. 74–768. Thus, under our interpretation of Title VII, court

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actions would proceed in the absence of an administrative record only in those isolated instances when more than 180 days have elapsed since the filing of an administrative complaint without any department or agency action.[9] 5 C.F.R. 713.281(b). In such cases, a trial *de novo* may well be required in order to effectuate the congressional desire for a speedy resolution of federal employment discrimination disputes. We submit, however, that there is no reason why the inadequacy or incompleteness of an administrative record on those rare occasions—which can be handled

[9] Court review without an administrative hearing also can occur in two other situations. First, an employee may file suit after the department or agency has rejected or cancelled his complaint on non-evidentiary grounds, such as the inapplicability of Title VII or untimely filing. 5 C.F.R. 713.215. Obviously, the district court can review the legitimacy of that action without the need for a complete evidentiary record. Furthermore, if the court concludes that the agency has acted erroneously, the proper course would be to remand for further administrative proceedings, not to hold a trial *de novo*. See, *e.g.*, *United States* v. *Carlo Bianchi & Co., Inc.*, *supra*, 373 U.S. at 718; *Branley* v. *Hampton*, 403 F. Supp. 770, 775, n. 8 (D. D.C.); *Butler* v. *Kleppe*, 9 EPD ¶ 10,054 (D. D.C.); *Harrison* v. *Butz*, 375 F. Supp. 1056 (D. D.C.). Second, an employee may refuse a hearing after the agency fails to achieve adjustment of his complaint. 5 C.F.R. 713.217. A complainant who, by his own conduct, waives his right to an administrative hearing should of course not be permitted to use the lack of an administrative hearing record as a justification for obtaining a trial *de novo*. See *Hackley* v. *Roudebush*, *supra*, 520 F. 2d at 158, n. 201. Moreover, in many such situations, the district court can determine whether the agency's action was justified on the basis of the investigative record required by 5 C.F.R. 713.216. Although *amicus* contends (Br. 15–16, n. 14) that there can be no prospective waiver of an employee's rights under Title VII, this assumes the conclusion that a federal complainant has an absolute right to a trial *de novo* in the district court.

by the district court as circumstances warrant—should necessitate a trial *de novo* for *every* litigant, regardless of the adequacy or completeness of his administrative record. Indeed, the present case, in which petitioner's complaint resulted in protracted administrative proceedings and the compilation of a full hearing record, well illustrates the unreasonableness of a construction of Section 717 that would mandate a *de novo* judicial retrial of every discrimination complaint.

B. THE LEGISLATIVE HISTORY OF THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964 DOES NOT INDICATE A CONGRESSIONAL INTENT TO ACCORD EVERY FEDERAL EMPLOYEE A RIGHT TO TRIAL *DE NOVO*

The legislative history of the 1972 Amendments to the Civil Rights Act does not conclusively answer the question whether a trial *de novo* is required in federal Title VII cases. A careful reading of this history, however, does indicate that Congress, in providing a civil action following exhaustion of an employee's enhanced administrative remedies, contemplated that the courts would engage in a review on the administrative record. The fundamental flaw in petitioner's contrary contention, in our view, rests in her seizing upon snippets of legislative debate without a discriminating analysis of the precise subject under debate or the context in which the debate occurred. Thus, while the history indicates that Congress undoubtedly intended to accord federal employees the same substantive Title VII rights enjoyed by their colleagues in private industry, Congress was not con-

cerned that federal workers utilize the identical procedures in enforcing those rights.

The 1972 Amendments to Title VII were considered against a backdrop that included allegations of widespread discrimination in federal employment, compounded by serious doubts that federal employees had redress in court because of sovereign immunity. The Civil Rights Act of 1964, of course, did not apply to federal employment, and federal administrative proceedings were frequently valueless because, among other reasons, effective make-whole relief could not be granted. Moreover, in the private sector, although the EEOC had authority to attempt conciliation in employment discrimination cases, it had no enforcement authority and lacked the power to conduct an evidentiary hearing (although it could conduct an investigation). Section 706, 42 U.S.C. (Supp. IV) 2000e–5.

1. On June 2, 1971, to remedy these deficiencies, the Committee on Education and Labor of the House of Representatives reported H.R. 1746, the so-called "Hawkins Bill" (named after its chief sponsor, Rep. Hawkins), to the House. This bill, *inter alia,* would have given the EEOC authority to hold evidentiary hearings on individual complaints in private sector cases, following an investigation finding reasonable cause to believe the charge of discrimination (H.R. 1746, 92d Cong., 1st Sess. 3–6 (1971); Legislative History at 34–37). If the EEOC found that an employer had engaged in a discriminatory employment practice, it could issue a cease and desist order reviewable in

the court of appeals under a substantial evidence scope of review (H.R. 1746, *supra,* at 7–10; Legislative History at 38–41). If, on the other hand, the EEOC found no reasonable cause or probable jurisdiction or did not act within 180 days of the complainant's initial charge, the employee could file a civil action in the district court (H.R. 1746, *supra,* at 23–25; Legislative History at 54–56). With regard to federal employment, the bill would have transferred Civil Service Commission responsibility in equal employment opportunity matters to the EEOC and authorized a "civil action" by a federal employee following notification of final agency action (H.R. 1746, *supra,* at 28–29; Legislative History at 59–60).

Because of substantial opposition to the Hawkins Bill, a substitute proposal by Rep. Erlenborn was introduced in the House on June 17, 1971 (H.R. 9247, 92d Cong., 1st Sess.; Legislative History at 141–147). This bill would have denied the EEOC cease and desist power, but would have authorized it to bring suit on a complainant's behalf in the district court. There was no provision in the so-called "Erlenborn Substitute" covering discrimination in federal employment and, although the floor debate centered primarily around EEOC cease and desist authority, several Congressmen noted the absence of any such federal anti-discrimination features (117 Cong. Rec. 32095 (1971) (remarks by Del. Fauntroy); 117 Cong. Rec. 32097 (1971) (remarks of Rep. Abzug); 117 Cong. Rec. 32098 (1971) (remarks of Rep. Steiger);

Legislative History at 271, 276, 280). On September 16, 1971, the House accepted the Erlenborn Substitute by a narrow margin and then overwhelmingly passed the bill (117 Cong. Rec. 32111–32113; Legislative History at 312–323). Thus, as initially approved by the House of Representatives, the amendments to Title VII did not extend to federal employment at all and, in private sector cases, contained no provision giving the EEOC power to make binding findings of fact based on an administrative record.

Meanwhile, on September 14, 1971, a bill making substantially the same changes in Title VII as the Hawkins Bill was introduced in the Senate by Senator Williams. The Senate Committee on Labor and Public Welfare reported this bill in amended form (the "Senate Committee Bill") on October 28, 1971 (S. 2515, 92d Cong., 1st Sess.; Legislative History at 344–409).

With respect to the private sector, the Senate Committee Bill granted the EEOC cease and desist power following an evidentiary hearing, and, in the event of timely EEOC action, provided for judicial review on the EEOC administrative record in the court of appeals under a substantial evidence test (S. 2515, *supra,* at 42, 44; Legislative History at 385, 387).[10] Except for a subsequent technical change, the federal employment provisions of the Senate Committee Bill were worded precisely as finally enacted into law. In particular, responsibility for assuring nondiscrimination in federal employment was retained in the Civil Service Commission rather than transferred to the EEOC (as in the Hawkins Bill in the House and in the original Williams Bill) (S. 2515, *supra,* at 62–66; Legislative History at 405–409).

[10] The private sector provisions of the bill at this stage are described in detail *infra*, pp. 39–43.

On the Senate floor, Senator Dominick offered an amendment to the Senate Committee Bill that would have substituted EEOC enforcement authority in the district court for EEOC cease and desist authority, but would have retained the provision for a district court civil action for federal employees (Legislative History at 553–558). This amendment was rejected by a vote of 43–41 on January 24, 1972, and again (following agreement by a narrow margin to a motion to reconsider) by a vote of 48–46 on January 26, 1972 (118 Cong. Rec. 945, 951, 1384; Legislative History at 843, 859, 912).

A filibuster ensued and two attempts at cloture were unsuccessful (118 Cong. Rec. 1972, 2494 (1972); Legislative History at 1211, 1335). Senator Dominick then introduced another amendment (Legislative History at 1499–1504) substituting EEOC court enforcement authority for cease and desist powers in the private sector. When it became evident that passage of this amendment was needed in order to obtain sufficient votes for cloture, the Senate agreed to the Dominick amendment on February 15, 1972 (118 Cong. Rec. 3973 (remarks of Senator Allen), 3979–3980; Legislative History at 1542, 1557, 1561). One

week later cloture was voted, and the Senate passed the bill on the same day (118 Cong. Rec. 4912, 4944 (1972); Legislative History at 1699, 1779). Following a conference in which, *inter alia,* the Senate-passed provisions regarding federal employment discrimination were accepted by the House conferees, the Senate and House of Representatives accepted the conference report on March 6 and 8, 1972, respectively (118 Cong. Rec. 7170, 7573; Legislative History at 1854, 1875). The bill was signed into law on March 24, 1972.

Although several issues were explored in detail during the course of the extended legislative debates on these amendments to Title VII, the central and most heatedly discussed question in both the House and the Senate was whether, in private sector cases, the EEOC should be given cease and desist powers or merely the authority to bring suit on a complainant's behalf in the district court. Discussion of the provisions regarding federal employees was limited. Since the federal employment provisions as eventually enacted were initially prepared in the Senate Committee, and since the House bill as originally passed contained no federal anti-discrimination provisions, the legislative history on the Senate side is the more probative here.

2. While there is little explicit indication in this legislative history of the appropriate scope of court review in federal employee actions, there are repeated, specific assertions of the purposes for passing the federal civil action provisions. The following sentences explaining the rationale behind the fed-

eral employment discrimination section appear unchanged [11] in the Senate Committee Report and in an analysis submitted by Senator Williams, the floor manager of the Senate Committee Bill, on the day of final passage of the Senate bill:

> The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate.

S. Rep. No. 92–415, 92d Cong., 1st Sess. 16 (1971); 118 Cong. Rec. 4923 (1972); Legislative History at 425, 1730.[12]

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[11] For a discussion of the preceding and subsequent language, dealing with the equivalency of federal employee rights to private sector rights, which language did change with the restructuring of private sector procedures through amendment of the Senate Committee Bill, see *infra*, pp. 37–48.

[12] The House Committee Report similarly states:

"Despite the series of executive and administrative directives on equal employment opportunity, Federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies. There is serious doubt that court review is available to the aggrieved Federal em-

None of these reasons articulated as a basis for the federal civil action provision supports the implication of a trial *de novo*. First, Congress was primarily concerned that nearly all federal governmental action in regard to its employees, at least short of discharge, had been considered unreviewable in many courts because of sovereign immunity. See, *e.g., Gnotta* v. *United States,* 415 F. 2d 1271 (C.A. 8) (Blackmun, J.), certiorari denied, 397 U.S. 934; *Blaze* v. *Moon,* 440 F. 2d 1348 (C.A. 5). Thus Senator Cranston, who co-authored the Senate federal employee sections,[13] stated just prior to passage of the Senate bill:

> For the first time, [my Federal Government EEO amendment would] permit Federal employees to sue the Federal Government in discrimination cases—under the theory of Federal sovereign immunity, courts have not generally allowed such suits—and to bring suit either prior to or after CSC review of the agency EEO decision in the case.

ployee. Monetary restitution or back pay is not attainable. In promotion situations, a critical area of discrimination, the promotion is often no longer available. Information and documents contained in Government files are not obtainable since the Freedom of Information Act exempts internal personnel rules. Under the proposed [House Committee Bill], court review, back pay, promotions, reinstatement, and appropriate affirmative relief is available to employees in the private sector; also the Commission has broad powers to conduct an intensive investigation and obtain access to all pertinent records." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 25 (1971); Legislative History at 85.

[13] See 118 Cong. Rec. 4929, 4940, 4949 (1972); Legislative History at 1744, 1768, 1792.

118 Cong. Rec. 4929 (1972); Legislative History at 1744.[14] The waiver of sovereign immunity to permit review of agency equal employment opportunity determinations obviously indicates the desire only to provide a judicial remedy, not to mandate the precise contours of that remedy.

Second, Congress was disturbed by the apparent inability of the Civil Service Commission, the agency that had been responsible for enforcing the ban on discrimination in federal employment as decreed by executive order,[15] to grant full relief to aggrieved employees—relief, such as back pay and immediate advancement, that was considered indispensable to private sector Title VII enforcement. Senator Cranston thus told his colleagues immediately prior to passage of the Senate bill:

> My Federal Government EEO amendment * * * would * * * [e]ntitle an employee to back pay if discrimination has been found to exist—the Government has insisted it does not have legal authority to make such awards.

118 Cong. Rec. 4929 (1972); Legislative History at 1744. Again, the congressional intent to assure that such remedies were available to federal employees, not only in the courts but also in the agencies which were to retain primary responsibility for meeting the prom-

[14] See also 118 Cong. Rec. 4922 (1972) (remarks of Senator Williams); Legislative History at 1727.

[15] See, *e.g.*, Executive Order 11478, 3 C.F.R. 207 (1974); Executive Order 11246, 3 C.F.R. 567 (1966); Executive Order 10590, 3 C.F.R. 237 (1954–1958 Comp.); Executive Order 9980, 3 C.F.R. 720 (1943–1948 Comp.).

ise of equal employment opportunity, does not suggest that a trial *de novo* rather than a court review of the administrative record was intended.

Finally, Congress sought to alleviate the confusion over the proper administrative recourse available to a federal employee alleged to be the victim of discrimination. The statute as enacted, which clarified the administrative mechanism for the adjustment of such grievances, does not on its face grant a right to *de novo* review once the administrative decision has been appealed to the district court. See *supra,* pp. 16–25. And, indeed, if any inference is to be drawn from the clear dual requirements of the 1972 Amendments that (a) an employee first seek administrative relief of his complaint and (b) a strengthened and adequate administrative mechanism be available to adjudicate the complaint and to grant a complete remedy, it is that the courts are not free to disregard the work of the agency and Civil Service Commission and to begin anew.

The legislative debates on the extension of Title VII to federal employees also questioned the adequacy of Civil Service Commission EEO proceedings, including its complaint procedure. See H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 23–24 (1971); S. Rep. No. 92–415, *supra,* at 14–15; 118 Cong. Rec. 4922 (1972) (remarks of Senator Williams); Legislative History at 83–84, 423–424, 1726. The Hawkins Bill, as well as the original Williams Bill, proposed the transfer of Civil Service Commission EEO authority to the EEOC. The

Senate Committee, however, expressly decided to retain Civil Service Commission authority over employment discrimination matters in the federal government, and its recommendation was adopted by both Houses of Congress and by the President. As the Senate Committee Report stated:

> The Civil Service Commission's primary responsibility over all personnel matters in the Government does create a built-in conflict of interest for examining the Government's equal employment opportunity program for structural defects which may result in a lack of true equal employment opportunity. Yet, the Committee was persuaded that the Civil Service Commission is sincere in its dedication to the principles of equal employment opportunity enunciated in Executive Order 11478 and that the Commission has the will and desire to overcome any such conflict of interest. In order to assist the Commission in accomplishing its goals and to make clear the Congressional expectation that the Commission will take those further steps which are necessary in order to satisfy the goals of Executive Order 11478, the Committee adopted in Section 707(b)[*sic*] of the bill specific requirements under which the Commission is to function in developing a comprehensive equal employment opportunity program.

S. Rep. No. 92–415, *supra,* at 15; Legislative History at 424.

There was, we submit, ample reason for the congressional determination to preserve, in the area of

EEO complaints, the Commission's "primary responsibility" for federal personnel matters. For the Civil Service Commission, as well as the officials responsible for individual agency personnel administration under the Commission's guidance, is charged with the basic responsibility of maintaining a merit system of employment in the federal service.[16] Because of their experience with the requirements of the federal merit system of employment, the Commission and other responsible federal personnel officials are peculiarly qualified [17] to evaluate complaints of employment discrimination in light of those requirements and to adjudicate discrimination complaints in a way that is compatible, rather than in conflict, with the more pervasively non-discriminatory maintenance of the merit system of federal employment.

Thus, whatever the perceived imperfections in Civil Service Commission procedures,[18] Congress deliber-

[16] As Senator Pendleton stated, in sponsoring the original civil service law (sometimes referred to as the Pendleton Act):

> The single, simple, fundamental, pivotal idea of the whole bill is, that whenever, hereafter, a new appointment or a promotion shall be made in the subordinate civil service in the departments or larger offices, such appointment or promotion shall be given to the man who is best fitted.

S. Rep. No. 576, 47th Cong., 2d Sess. X (1882) (statement of Senator Pendleton).

[17] During the first half of Fiscal Year 1976, for example, the Commission's 102 complaints examiners conducted EEO complaint hearings in 926 cases, or 24.7% of their total docket of 3750 hearings. In Fiscal Year 1975, 1216 (20.8%) of the examiners' 5846 hearings were devoted to EEO complaints.

[18] In a portion of his analysis of the legislative history in *Hackley* v. *Roudebush*, *supra*, not joined by the other members

ately determined to maintain federal EEO jurisdiction within the agencies and the Commission and, through improved administrative proceedings, to continue the "primary responsibility" [19] of the Executive Branch to assure non-discrimination in employment. Absent a showing of procedural unfairness, legal error, or inadequate evidentiary support, judicial deference to the results of these administrative proceedings would best comport with this legislative determination.

3. Petitioner (Br. 30, 38–39, 45), like those courts that have held federal employees entitled to a judicial trial *de novo,* relies heavily on the following statement from the Senate Committee Report:

> An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private right of action in the courts by Federal employees who are not satisfied with the agency or Commission decision.

of the panel, Judge Wright, minimized the improvement in Commission procedures since the enactment of the 1972 Amendments. 520 F. 2d at 137–141. Obviously, however, Civil Service Commission conduct subsequent to 1972 is not relevant to an assessment of the intent of Congress in passing the federal amendments. Moreover, as we explain *infra*, pp. 56–63, we disagree with Judge Wright's conclusion as to the adequacy of current Civil Service Commission procedures.

[19] Section 717(e) of the Act provides:

"Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government."

> The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies. Moreover, the remedial authority of the Commission and the courts has also been in doubt. The provisions adopted by the committee enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. *Aggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII.*

S. Rep. No. 92–415, *supra,* at 16; Legislative History at 425 (emphasis added). We have previously shown (see *supra,* pp. 30–34) that the initial portion of this excerpt indicates a legislative intent behind the federal employee provisions of the 1972 Amendments that in no way requires *de novo* judicial review. The last sentence, however, has been interpreted by three courts of appeals to mean that Congress contemplated *de novo* review for federal employees, since private sector suits were then and are now trials *de novo* and the federal employee provisions as finally enacted are essentially identical to those referred to in the Senate Committee Report.[20]

[20] See, *e.g.*, *Hackley* v. *Roudebush*, *supra*, 520 F. 2d at 143–144; *Caro* v. *Schultz*, *supra*, 521 F. 2d at 1087–1088; *Sperling* v. *United States*, *supra*, 515 F. 2d at 471, 480–481.

With deference, we submit that that reading of the sentence improperly ignores the provisions of the specific bill to which the report was addressed, and is erroneous. While the federal employment provisions ultimately signed into law are indeed essentially the same as those discussed in the report, the private sector provisions of the Senate Committee Bill that was the subject of the report differed significantly from those either then in existence or ultimately enacted. Therefore, in order to determine the intent reflected in the statement in the Senate Committee Report equating federal and private enforcement procedures under the proposed bill, the system of judicial review proposed for private employees in the Senate Committee Bill must be examined.

As we have noted, *supra,* p. 28, the Senate Committee Bill proposed to give the EEOC cease and desist authority in the private sector. Following the filing of a charge of employment discrimination, the EEOC would undertake an investigation. If it found reasonable cause to believe that the charge was true, it would endeavor by "conference, conciliation, and persuasion" to eliminate the practice (S. 2515, *supra,* at 34–35; Legislative History at 377–378). If those efforts were unsuccessful, the EEOC would issue a complaint to the employer, and a full administrative hearing, with testimony taken under oath and transcribed verbatim, would follow (S. 2515, *supra,* at 38–39; Legislative History at 381–382). The EEOC would then state its findings of fact and either dismiss the

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complaint or issue a cease and desist order to the employer, which order could include provisions for reinstatement with back pay (S. 2515, *supra,* at 39–40; Legislative History at 382–383). Either action by the EEOC would be reviewable only by a United States court of appeals *to determine whether substantial evidence supported the EEOC decision* (S. 2515, *supra,* at 41–45; Legislative History at 384–388).

The bill also provided for a civil action in the district court in certain limited circumstances (S. 2515, *supra,* at 47–50; Legislative History at 390–393). In the absence of a conciliation agreement to which the aggrieved person was a party, a private sector employee could bring a civil action (1) if the EEOC dismissed his charge for lack of reasonable cause, (2) if 180 days after filing the charge with the EEOC, the Commission had issued no complaint (this right ended after 60 days or once the EEOC issued a complaint, but if suit was filed under this provision, the EEOC was precluded from further action), or (3) if 180 days after issuing a complaint the EEOC had made no decision and issued no order (this right ended once the EEOC issued an order).[21] With regard to the last provision, the bill provided that a district court could stay an action brought during the period from 180 days to one year after the issuance of the complaint——

[21] A civil action in the district court was also permitted under the Senate Committee Bill if the EEOC entered into a post-complaint agreement with the employer to which the aggrieved person was not a party.

> upon a showing that the Commission has been acting with due diligence on the complaint, that the Commission anticipates the issuance of an order * * * within a reasonable period of time, that the case is exceptional, and that extension of the Commission's jurisdiction is warranted.

S. 2515, *supra,* at 50; Legislative History at 393.

The obvious purpose of these provisions was to give an aggrieved employee a plenary, *de novo* judicial remedy only in the event that he had been unable to obtain a timely EEOC order based upon an administrative hearing; under the bill, a civil action could not be instituted in the district court if the complainant had previously obtained an administrative order, either satisfactory or adverse, based upon a hearing record. Substantial evidence review in the court of appeals on the basis of that administrative record would then be the exclusive remedy. Nor was this result inadvertent—the Senate Committee Report clearly explained that the bill was intentionally drafted to preclude an employee from retrying his case in the district court after losing at the administrative level:

> The committee is concerned, however, about the interplay between the newly created enforcement powers of the [EEO] Commission and the existing right of private action. It concluded that duplication of proceedings should be avoided. The bill therefore contains a provision for cutoff of the Commission's jurisdiction once the private action has been filed—except for the power to intervene—as well as a cutoff

> of the right of private action once the Commission issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and the aggrieved party.
>
> * * * * *
>
> It should be noted, however, that it is not the intention of the committee to permit an aggrieved party to retry his case merely because he is dissatisfied with the Commission's action. Once the Commission has issued an order, further proceedings must be in the courts of appeals * * *.

S. Rep. No. 92–415, *supra,* at 24; Legislative History at 433.

The district court civil action authorized in limited circumstances by the Senate Committee Bill was a trial *de novo,* but not because of anything provided in Section 706 (see *supra,* pp. 20–21). Rather, precisely because such actions could be brought only when there was no prior administrative hearing record to review, a trial *de novo* was a necessity. Once an administrative record had been compiled, however, court review was to be confined to a determination of whether the administrative findings were supported by the evidence adduced. When viewed in context, therefore, the statement in the Senate Committee Report that "[a]ggrieved employees or applicants will also have the full rights available in the courts as are granted to individuals in the private sector under title VII" (S. Rep. No. 92–415, *supra,* at 16; Legislative History at 425) indicates not an absolute right to a trial *de*

novo but, to the contrary, that a *de novo* judicial proceeding in federal employment cases is appropriate only in the absence of an administrative hearing record, and that otherwise a more restricted scope of judicial review was envisioned. See *Pointer* v. *Sampson,* 62 F.R.D. 689, 693 (D. D.C.)

The conclusion that Congress intended federal antidiscrimination remedies roughly to parallel these private sector judicial review provisions under the Senate Committee Bill follows not only from this explicit legislative history but also from the structure of the 1972 Amendments as finally enacted. Thus, in addition to the civil action permitted after final agency or Civil Service Commission review, a federal employee may bring a civil action (1) if 180 days after filing a charge with the appropriate agency there has been no final agency action (this right ends once the agency acts) and (2) if 180 days after filing an appeal to the Civil Service Commission the Commission has made no decision (this right ends once the Civil Service Commission decides). The parallel is emphasized by the Section-by-Section Analysis in the Senate Committee Report:

> The provisions of sections 706(q) through (w) concerning private civil actions by aggrieved persons are made applicable to aggrieved Federal employees or applicants. They could file a civil action within 30 days of notice of final action on a complaint made pursuant to section 717(b), or after 180 days from the filing of an initial charge, or an appeal with the [Civil Service] Commission. The authority given to

> the [Equal Employment Opportunity] Commission or the limitations placed upon the Commission under sections 706(q) through (w) would apply to the Civil Service Commission or the agencies, as appropriate, in connection with a civil action brought under section 717(c). So, for example, if the Civil Service Commission or agency does not issue an order within 180 days after a complaint or appeal is filed, the aggrieved person may also institute a civil action. If such action is instituted within one year of the filing of the complaint or appeal, the Civil Service Commission or agency may request that the action be stayed or dismissed upon a showing that it has been acting with due diligence, that it anticipates issuance of an order within a reasonable time on the complaint or appeal, that the case or proceeding is exceptional and that extension of *exclusive jurisdiction of the Civil Service Commission or agency* is warranted.

S. Rep. No. 92–415, *supra,* at 45–46; Legislative History at 454–455 (emphasis added).[22] There obviously would be little point to extending the agency's or the Civil Service Commission's jurisdiction for an additional 180 days if Congress had contemplated a *de novo* proceeding in the district court even after a final agency or Commission decision. On the contrary, the reference to "exclusive jurisdiction of the Civil

[22] On February 15, 1972, following the amendment of the Senate Committee Bill to eliminate EEOC cease and desist powers and to place all private sector enforcement in the district courts, Section 706(q) was eliminated as unnecessary, the renumbering of Sections 706(f) through (k) as Sections 706(r) through (w) was deleted, and the federal employment provision incorporating

Service Commission or agency" strongly indicates that review, rather than retrial, of timely agency or Commission determinations was contemplated.[23]

Sections 706(q) through (w) was changed to incorporate Sections 706(f) through (k). 118 Cong. Rec. 3980; Legislative History at 1562. This technical amendment removed the private sector provision permitting the EEOC to seek additional time from the district court in which to issue an order—a provision that was of course no longer necessary in view of the removal of EEOC authority to issue orders. The amendment, however, inadvertently also removed express stay authority from federal agencies and the Civil Service Commission, which continued to retain power to issue orders. Nevertheless, just prior to passage of the Senate bill, Senator Williams submitted a Section-by-Section Analysis which reiterated that the Civil Service Commission or an agency could seek to stay a district court action filed after the elapse of 180 days. 118 Cong. Rec. 4943–4944 (1972) Nothing in the statute as enacted would bar the Commission or an agency from seeking such a stay. Even if it is assumed, however, that the Civil Service Commission or an agency would not now be permitted to stay a district court action, the above-quoted excerpt demonstrates that Sections 717(c) and (d) were intended to incorporate into federal employment suits the dual characteristics of private sector court actions found in the Senate Committee Bill: trial *de novo* in the absence of an administrative order issued after opportunity for a hearing, or substantial evidence review following such an order.

[23] The District of Columbia Circuit, in *Hackley* v. *Roudebush*, *supra*, relied on certain statements by Senator Dominick which it read to imply that private sector employee rights under the Senate Committee Bill contrasted with, rather than paralleled, the rights given to federal employees by the bill. 520 F. 2d at 130–131 and n. 85. Arguing against EEOC cease and desist authority, Senator Dominick had indicated that the provisions of the Senate Committee Bill for such authority in the private sector were not comparable to the court enforcement procedures to be available to federal employees. See, *e.g.*, 118 Cong. Rec. 595, 697, 3389 (1972); Legislative History at 683, 693, 1441. Each of these statements

This result is also required by the analysis of the Senate bill submitted by Senator Williams *after* the Senate had agreed to an amendment removing EEOC cease and desist authority and placing all private sector enforcement actions in the district court without an administrative hearing. This analysis relied heavily on the language of the earlier Senate Committee Report but, significantly, *changed* the crucial wording discussed above (now erroneous because of the private sector amendment) to make clear that *review* of the

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was generally phrased and none specifically indicated the scope of review in federal employee actions; all were addressed to a separate and distinct issue. Senator Dominick's extemporaneous comments are therefore not authoritative on the question presented here and should not be accorded the weight of explanatory remarks. Indeed, it would be improper to do so, since he was speaking in opposition to the bill reported out by the Committee, and no sponsor of that bill or spokesman for the Committee majority reporting it out expressed agreement with his characterizations of its effects. Moreover, the lack of authoritativeness of his remarks is shown by the fact that at least twice during the debate he erroneously attributed some aspect of the assertion of federal employee court rights to the Attorney General. See 118 Cong. Rec. 3389, 3809 (1972) : Legislative History at 1440, 1482. At most, therefore, Senator Dominick's statements add an element of ambiguity to the floor debates for present purposes. More probative evidence in the legislative history, discussed in the text above, indicates that federal employees, like private sector employees under the Senate Committee Bill, were entitled only to judicial review on the administrative record when the agency or Civil Service Commission had made a determination based upon an administrative hearing record.

agency record in federal employee cases was still contemplated: [24]

> An important adjunct to the strengthened Civil Service Commission responsibilities is the statutory provision of a private *right of action of review of the agency proceedings* in the courts by Federal employees who are not satisfied with the Agency or Commission decision.
>
> * * * The provisions adopted by the Committee will enable the Commission to grant full relief to aggrieved employees, or applicants, including back pay and immediate advancement as appropriate. Aggrieved employees or applicants will also have the full *rights of review* available in the courts.

118 Cong. Rec. 4923 (1972) ; Legislative History at 1730 (emphasis added). Senator Williams' oral remarks at the time he presented this analysis are fully consistent with the same conclusion—that where there has been a final agency or Civil Service Commission determination, reached after the opportunity for an administra-

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[24] For a side-by-side comparison of the two statements, see *Sperling* v. *United States*, *supra*, 515 F. 2d at 480, n. 71 (Pet. App. 70a-71a). The *Sperling* court noted the changes in wording and gave greater credence to the Senate Committee Report, without recognizing that the Committee Report referred to private sector rights that were significantly different from those provided by the bill at the time of Senator Williams' analysis.

tive hearing, a review of the administrative record rather than a trial *de novo* was intended:

> Finally, written expressly into the law is a provision enabling an aggrieved Federal employee to file an action in U.S. District Court for *a review of the administrative proceeding record after a final order by his agency or by the Civil Service Commission,* if he is dissatisfied with that decision.

118 Cong. Rec. 4922 (1972); Legislative History at 1727 (emphasis added).

Although the Senate Committee Report and these statements of Senator Williams, the floor manager of the bill, strongly suggest that Congress did not anticipate that federal employees would be entitled to a trial *de novo* in every instance, the only statement directly addressing the scope of review is that of Senator Cranston, who referred to the federal employment provisions of the Senate bill as "my amendment." 118 Cong. Rec. 4929, 4931 (1972); Legislative History at 1744, 1749. The Congressional Record recorded Senator Cranston as stating on the day that the bill passed the Senate:

> For the first time, [my Federal EEO amendment would] permit Federal employees to sue the Federal Government in discrimination cases—under the theory of Federal sovereign immunity, courts have not generally allowed such suits—and to bring suit either prior to or after CSC review of the agency EEO decision in the case. As with other cases brought under Title VII of the Civil Rights Act of 1964, Federal district court review would be based on the agency and/or CSC record and would not be a trial de novo.

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118 Cong. Rec. ~~4920~~ (1972); Legislative History at 1744. Almost a year after the debate and ten months after the 1972 Amendments had been enacted, Senator Cranston announced that "the word 'not' was misplaced" in the Congressional Record, and that when "set forth * * * in the correct manner" his statement would read "review would not be based on the agency and/or CSC record and would be a trial de novo." 119 Cong. Rec. S1219 (daily ed. Jan. 23, 1973). We submit that Senator Cranston's statement as belatedly corrected is of little probative value in determining congressional intent. As the Eighth Circuit noted:

> While Senator Cranston has clarified his personal intent, we cannot ignore the fact that during the two months following the initial statement while the Act went through Conference Committee and was finally approved, the official journal of Congress contained his explicit and authoritative interpretation rejecting any automatic requirement of a *de novo* trial. In considering the intent of Congress, we cannot rule out the possibility, if not the probability, that Senator Cranston's remarks as initially reported, especially when read with the comments of Senator Williams, were relied upon by many congressmen.

Haire v. *Callaway, supra,* slip op. 6 n. 4.

The legislative history of the 1972 Amendments to

Title VII, then, if viewed as a whole and with an appreciation of the context at each stage of the debate, manifests an intent to require review, not retrial, of agency and Civil Service Commission equal employment opportunity determinations that are based on an administrative record following the opportunity for a hearing. While not unambiguous on every facet of the federal employee provisions, this history at the very least refutes petitioner's contention that Congress clearly intended to mandate judicial trials *de novo* in all Title VII cases.

C. THE STATUTORY SCHEME IS BEST PROMOTED BY CONFINING JUDICIAL REVIEW IN ORDINARY CASES TO THE ADMINISTRATIVE RECORD

Although the legislative history outlined above indicates that court review of an administrative record was contemplated by Congress, neither it nor the language of the statute unequivocally sets forth the scope of review to be applied by the district court in federal employment discrimination cases. Absent such clear guidance, this Court has repeatedly indicated that "*de novo* review is generally not to be presumed." *Consolo* v. *Federal Maritime Commission, supra,* 383 U.S. at 619, n. 17; *United States* v. *Carlo Bianchi & Co., Inc., supra,* 373 U.S. at 715.

In private sector Title VII actions, the Court has held this presumption against *de novo* review inapplicable, basically because of the limited nature of the EEOC administrative investigation or the union grievance-arbitration proceedings conducted prior to the

institution of the civil suit—neither of which was intended, or purports, to be an administrative determination of the Title VII claim. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792; *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36. Federal employees are, by contrast, afforded an effective administrative remedy for their Title VII complaints under an elaborate and fair procedure, established by an integrated set of regulations, that is designed specifically to adduce the salient facts and to compile a full evidentiary record for administrative determination and, ultimately, judicial review.

Given this administrative remedy, under a procedure inherently adequate to protect the employee's rights, routine trials *de novo* would tend to defeat, rather than advance, the purposes of the statutory scheme. Such duplicative proceedings would conflict with the congressional directive that employment discrimination disputes be settled expeditiously, would undermine the integrity of the administrative process and retard its evolutionary improvement, and would add unnecessary expense and delay for all concerned. Moreover, little systemic benefit would be gained by *de novo* proceedings, since the employee's rights are fully protected by a fair and complete administrative hearing, resulting in findings of fact and an administrative determination that is subject to prompt judicial review.

1. In *McDonnell Douglas Corp.* v. *Green, supra,* this Court held that in private sector Title VII actions an

EEOC finding of reasonable cause is not a jurisdictional prerequisite to suit and that a finding of no reasonable cause is not a bar to suit. 411 U.S. at 798–799. The Court further recognized that the court action following EEOC consideration must necessarily be a *de novo* proceeding. But, as we have stated, this result was not based upon a determination that the Act itself requires the district court always to proceed *de novo*. Rather, the result was founded upon a realistic appraisal of the function and limitations of the agency proceedings prior to suit. The Court specifically referred to "the large volume of complaints before the [EEOC] and the nonadversary character of many of its proceedings." 411 U.S. at 799. Furthermore, the Court cited with approval the decisions of several lower courts that had summarized in greater detail the limited nature of EEOC powers and procedures.[25] For example, the Fifth Circuit had noted that the EEOC

> is neither required nor physically able to conduct an "in depth" investigation in every case; apparently the investigative procedure, in the instant case was performed on an ex parte basis, bereft of all the advantages which come from an adversary proceeding in a court of law. The [EEO] Commission possesses no power of enforcement; it cannot fix a penalty, issue a citation, or grant a cease and desist order.

Beverly v. *Lone Star Lead Construction Corp., supra,* 437 F. 2d at 1141 (footnote omitted).[26]

Similarly, in *Alexander* v. *Gardner-Denver Co., supra,* this Court held that the district court in a Title VII suit should not defer to findings concerning employer discrimination reached in a grievance arbitration award under a collective bargaining agreement. The primary determinant in *Alexander* was the important difference between rights under a labor-management contract (and their enforcement in an arbitration award) and the rights accorded by Title VII. 415 U.S. at 52–54, 57. The Court pointed out that an arbitrator's job is to give effect to the contractual intent of the parties—"the law of the shop"—rather than to the requirements of the Civil Rights Act—"the law of the land," 415 U.S. at 57—and that the parties' contractual intent, or the union's enforcement of it, may subordinate the interests of an individual employee to the collective interests of the bargaining unit, 415 U.S. at 58, n. 19. Accordingly, a policy of judicial deference in Title VII cases to the largely unreviewable awards of arbitrators under collective bargaining agreements would leave the employee with-

[25] *Robinson* v. *Lorillard* Corp., 444 F. 2d 791, 800 (C.A. 4); *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F. 2d 1136 (C.A. 5); *Flowers* v. *Local No. 6, Laborers International Union of North America*, 431 F. 2d 205 (C.A. 7); *Fekete* v. *U.S. Steel Corp.*, 424 F. 2d 331 (C.A. 3).

[26] Indeed, the fact that Congress did not intend EEOC proceedings to result in a record suitable for adjudication of a Title VII complaint is reflected in the restrictions in Section 706(b), 42 U.S.C. (Supp. IV) 2000e–5(b) on the use in court or the making public of anything "said or done during and as a part of" EEOC's conciliation efforts.

out a determination of his statutory claim by either court or arbitrator.[27]

Thus, in both *McDonnell Douglas* and *Alexander* the proceedings conducted prior to the filing in court of the Title VII suit did not constitute, or purport to be, an administrative determination of the Title VII claim and were not designed to produce a record suitable for adjudication of the Title VII claim. Accordingly, this Court held that the Title VII suit in such instances necessarily must proceed as a trial *de novo*. But the Court in those cases in no way addressed the question of the proper scope of judicial review of an administrative proceeding whose whole purpose was to determine the Title VII claim, and which has indeed resulted in an administrative determination of that claim. Much less did this Court hold that, with respect to such an administrative determination, *any* distinction between agency and district court procedures, regardless of the inconsequence of those differences upon Title VII enforcement, would require a trial *de novo*. To the contrary, it is normally the case that judicial review, involving issues as fundamental to the individual as those involved here, is confined to a record that has not been compiled in a manner identical to court proceedings. See, *e.g.*, *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182 (suspension of license

[27] The Court also noted several respects in which the informal arbitration proceeding was unsuited for the resolution of Title VII issues—in particular, the unavailability in most cases of a complete record, discovery, compulsory process, cross-examination or testimony under oath, and the lack of any obligation by arbitrators to give reasons for their awards. 415 U.S. at 57–58.

to operate stockyard); *Fein* v. *Selective Service System Local Board No. 7*, 405 U.S. 365 (induction into Armed Forces); *Richardson* v. *Perales*, 402 U.S. 389 (disability insurance benefits); *Goldberg* v. *Kelly*, 397 U.S. 254 (welfare payments); *W.E.B. DuBois Clubs of America* v. *Clark*, 389 U.S. 309 (registration requirement for political organization).

The administrative process rarely includes all the characteristics of district court trials—for example, formal rules of evidence generally do not apply, see 5 U.S.C. 556(d); *Richardson* v. *Perales, supra*, 402 U.S. at 400, 409—yet there is no inherent unfairness in the absence of such requirements.[28] See, *e.g.*, 402 U.S. at 402–406. The crucial question in each instance is whether the fact-finding mechanism that precedes court review is structurally incapable of building an adequate record or awarding effective relief.

2. Because the systemic defects found in *McDonnell Douglas* and *Alexander* are present in *every* EEOC and arbitral proceeding, the Court held that the Title VII complainant in those circumstances has an unconditional right to a trial *de novo*, without inquiry into whether the administrative or arbitral record compiled for other purposes in his case could adequately serve

[28] Indeed, relaxed enforcement of evidentiary rules by a Title VII complaints examiner benefits the employee, since a complainant (such as petitioner) who elects not to retain counsel may present his own case, with the assistance of the examiner and the investigative file, without regard to technical legal rules that might inhibit the search for the truth.

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as a basis for determining his Title VII claim.[29] In light of the significantly different nature of the administrative proceedings conducted to determine federal employment discrimination complaints, however, imposition of such an unyielding rule to judicial review of those Title VII determinations would be inappropriate. While there are, of course, differences between judicial proceedings and administrative enforcement actions supervised by the Civil Service Commission, the procedures prescribed by the Commission normally are fully capable of compiling a thorough record that can serve as the proper basis for judicial review, without sacrifice of legitimate Title VII interests.

The regulations promulgated by the Civil Service Commission pursuant to Section 717 of the Act provide that a federal employee who believes that he has been discriminated against on the basis of race, color, religion, sex, or national origin must communicate with an Equal Employment Opportunity Counselor of his agency in an effort to secure informal resolution,[30] and must receive a prompt and thorough in-

[29] The Court held in *Alexander*, however, that the arbitral decision is admissible in the Title VII suit and may be accorded such evidentiary weight as the district court deems appropriate. 415 U.S. at 60, n. 21.

[30] The employee must act within 30 days of the occurrence of the alleged discriminatory practice. Upon a showing by the employee of an adequate reason for failing to comply with the 30-day rule, the time limits will be extended. 5 C.F.R. 713.214(a)(4). Although *amicus* objects to this time limitation as unreasonable (Br. 29, 18a), it is no more stringent than the 30-day limitation on filing suit imposed by Section 717(c) of the Act, which has

vestigation following the filing of a formal discrimination complaint if conciliation of his grievance cannot be achieved within 21 days.[31] 5 C.F.R. 713.213–713.216. After the complainant has reviewed the completed investigatory file (which may contain statements under oath), the agency must again provide an opportunity for informal adjustment of the complaint and, if this is not successful, must advise the complainant of his right to a formal hearing. 5 C.F.R. 713.217.

At the hearing a complainant is accorded a full panoply of procedural rights. The hearing must be conducted by a complaints examiner certified as qualified by the Civil Service Commission. Except in nar-

been strictly enforced by the courts. See, *e.g.*, *Brown* v. *General Services Administration*, 507 F.2d 1300 (C.A. 2), pending on writ of certiorari, No. 74–768; *Carter* v. *Lynn*, 401 F. Supp. 1383 (D. D.C.); *Fuqua* v. *Robinson*, 398 F. Supp. 681 (D. N.J.).

[31] *Amicus* (Br. 14a–15a) criticizes this requirement of precomplaint counseling, contending that the failure of an employee to file a formal complaint after the counseling must indicate that a counselor, in violation of regulations, has discouraged him from doing so. This argument presupposes that every employee who seeks counseling must have been a victim of discrimination. The fact is that many of the complaints are nothing more than ordinary employee grievances and misunderstandings which can and should be resolved in an informal manner. In Fiscal Years 1972–1974, for example, EEO Counselors were able to obtain 30,491 corrective actions. (Of course, more than one corrective action may be achieved in a single case.) Furthermore, the availability of these informal procedures encourages employees to come forward with their complaints in a conciliatory setting, without being cast at the outset into an adversary role with their superiors. Indeed, the regulations expressly provide that the counselor may not reveal the identity of the employee during precomplaint processing unless authorized to do so by the employee. 5 C.F.R. 713.213(a).

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row circumstances, the examiner must be an employee of a different agency.[32] C.F.R. 713.218(a). The examiner initially reviews the complete investigative file and may order a supplemental investigation before the hearing if he feels it necessary. 5 C.F.R. 713.218(b). At the hearing, as throughout the entire administrative process, the complainant has the right to be accompanied, represented, and advised by a representative of his own choosing.[33] 5 C.F.R. 713.214(b). Moreover, the employee must be given ample opportunity to elicit all "[i]nformation having a bearing on the complaint or employment policy or practices relevant to the complaint * * *," and all testimony must be under oath or by affirmation. 5 C.F.R. 713.218(c)(2). The complainant may request the examiner to arrange for the presence as a witness of any federal employee who is likely to give pertinent testimony. 5 C.F.R. 713.218 (e). The complainant has the right to cross-examine witnesses. 5 C.F.R. 713.218(c)(2). The hearing must be recorded and transcribed verbatim, and all documents submitted become part of the record. 5 C.F.R. 713.218(f).

[32] The complaints examiner need not be an employee of another agency only when the agency in which the complaint arose is "(1) the government of the District of Columbia, or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency." In these circumstances the agency must "arrange with the [Civil Service] Commission for the selection of an impartial employee of the agency to serve as complaints examiner." 5 C.F.R. 713.218(a).

[33] Despite this provision, petitioner (Br. 61–62) and *amicus* (Br. 26–27) allege that a prime deficiency of the administrative proceedings is the failure to provide an attorney for the complainant or for attorney's fees if he prevails. The factual premise of these contentions is erroneous, since employees in administrative proceedings often have available the services of an attorney without charge. The Commission's regulations expressly state that lawyers in the complainant's agency may be allowed a reasonable amount of time away from their official responsibilities for the purpose of representing an aggrieved employee without fee (5 C.F.R. 713.214(b)) and certain agencies, such as the Department of Justice, operate an EEO Volunteer Representatives Program to assist Department employees in administrative proceedings. Indeed, the Attorney General has authorized Justice Department attorneys to represent employees in other federal agencies without compensation. The District of Columbia Bar Association, which serves the area of greatest concentration of government workers, also operates an Employment Discrimination Complaint Service, which refers federal employees to private and governmental lawyers who have agreed to provide free legal representation in discrimination cases.

In any event, appointment of an attorney for the complainant in Title VII court actions is discretionary under the statute, not absolute. Moreover, payment of attorney's fees relates only to a fringe benefit, not to a substantive or procedural defect of the administrative fact-finding process that would prevent the equitable resolution of an employee grievance. It is settled that the failure to provide paid attorneys does not render proceedings unfair. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 270, n. 46 (attorney's fees not awardable in civil rights actions brought under the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981). Congress could reasonably have determined that an award of attorney's fees to a successful complainant often is necessary in expensive and time consuming judicial proceedings, but not in administrative proceedings where, under the Commission's procedures, both the pre-hearing investigator (5 C.F.R. 713.216(a)) and the complaints examiner (5 C.F.R. 713.218(c)(2)) are under an independent obligation to develop the facts.

At the conclusion of the hearing, the examiner prepares a complete file, which must consist of the report of the EEO Counselor, the complaint, the investigative file, the record of the hearing, and the examiner's

findings of fact, proposed decision, analysis and (where appropriate) recommended remedy. 5 C.F.R. 713.218 (g). This record is then transmitted to the head of the agency or his designee, whose decision—required to be in writing—must be based thereon and must be sent to the complainant, together with a copy of the examiner's findings and the hearing record. 5 C.F.R. 713.221. If the agency rejects or modifies the examiner's recommendation, a specific statement of reasons must be provided.[34] If on the other hand the agency decides that discrimination has been proven, it may award such relief as retroactive promotion and back pay. 5 C.F.R. 713.271. Following final agency action, the complainant must be notified of his right to file a civil action or to appeal to the Civil Service Commission (and then, if unsuccessful, to file a civil action). 5 C.F.R. 713.281. Appeals are considered by the Commission's Appeals Review Board which, after reviewing the complaint file and all other relevant written representations made to it, must issue a written decision that may affirm or reverse the agency, remand to the agency for further investigation or fact-findings or for a rehearing, or order additional investigation to be conducted by Commission personnel.[35] 5 C.F.R. 713.234.

[34] Contrary to *amicus*' assertion (Br. 32a, n. 43), the Appeals Review Board has on occasion remanded cases to the agency for failure to specify the reasons for rejecting the complaints examiner's decision. See, *e.g.*, Appeals Review Board No. RB071350729 (June 30, 1975).

[35] In Fiscal Year 1975, 749 appeals of agency EEO decisions were decided by the Board. The Board affirmed the agency in 564

These administrative proceedings, while not the precise equivalent of district court trials, do not suffer the severe procedural or substantive limitations found in EEOC investigative processes or labor union arbitrations, and offer non-judicial remedies unparalleled in the private sector. Unlike EEOC proceedings, the federal employee has the right to a full hearing before an impartial examiner, at which he may be represented by counsel and may call and cross-examine witnesses, and where testimony is transcribed and taken under oath; also in contrast with EEOC proceedings, at the termination of the hearing adjudicative findings are made and a statement of the reasons for the decision is provided either by the complaints examiner or by the head of the agency. A full administrative record is created by the investigation and the subsequent hearing, and the agency has the power to afford complete relief.

cases (75%), reversed in 74 cases (10%), and remanded to the agency in 111 cases (15%). These statistics hardly indicate that the administrative appeal process is futile. By contrast, in 1974 the courts of appeals reversed the judgment in only 18.6 percent of their cases. Annual Report of the Director of the Administrative Office of the United States Courts, 1974, p. IX–12.

All decisions of the Appeals Review Board since July 1, 1974, are available to the general public at Civil Service Commission headquarters and at each of the Commission's ten regional offices. The Commission also distributes a quarterly *Index to Appeals Decisions*, which categorizes every Board decision and the reasons for the action taken, and a monthly *Digest of Significant Decisions*, which summarizes the noteworthy appeals. The *Digest* is mailed on a regular basis to any interested individual or organization.

Furthermore, contrary to *amicus'* attempt to portray agency and Civil Service Commission proceedings as suffering the same defects as labor union arbitrations (Br. 20–25), the Commission and federal agencies (unlike arbitrators) must follow the substantive law of Title VII in reaching their decisions. The assertion that in many instances they are in error as to that law does not change their responsibilities or the nature of the law they are bound to apply.[36] Such errors of law—which we can assume will diminish as Title VII is explicated by the courts and as administrative responsibility is secured—can be corrected by court review of the administrative decision on the administrative record as readily as (or, indeed, more readily than) by trial *de novo*.[37] See, *e.g.*, *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, 318; *National Labor Relations Board* v. *Brown*, 380 U.S. 278, 292. While such judicial review of arbitral awards would be incompatible with

[36] See *Morton* v. *Mancari*, 417 U.S. 535, 547, noting that "[i]n general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government." *Morton* concerned whether certain federal employment preferences for Indians survived the enactment of Title VII and its extension in 1972 to federal employees. Although frequently cited by petitioner, *Morton* indicates only that the *substantive* private sector Title VII law was carried over to the federal government, not that the federal and private sector procedural formats for enforcing Title VII must be identical. This Court referred only to the 1972 Amendments' "extending the *general* anti-discrimination machinery to federal employment." 417 U.S. at 548 (emphasis added).

[37] See, *e.g.*, *Day* v. *Weinberger*, 8 EPD ¶ 9771 (D. D.C.), pending on appeal, C.A.D.C., No. 75–1085, in which the district court,

the utility of informal arbitration procedure "as an efficient, inexpensive, and expeditious means for dispute resolution" (*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 58), it would serve to strengthen the administrative procedures for adjudication of federal Title VII claims (see pp. 67–68, *infra*).

without holding a trial *de novo*, rejected the agency's legal premise that back pay could not be awarded without a finding that the complainant would have been promoted absent the discrimination. (On appeal the government has contended not that federal employees must make a greater showing than private employees in order to receive back pay, but that, as in the private sector, employees are entitled to back pay only when they would have been promoted or hired but for the prohibited discrimination. 5 C.F.R. 713.271 (b)(1). See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (opinion of the Court), 440 (Marshall, J., concurring), 445 (Rehnquist, J., concurring).) Similarly, any error in applying the proper burden of proof may be remedied by the reviewing court. Contrary to *amicus'* contention (Br. 21–23), present administrative rules involving the burden of showing discrimination favor the complainant. Unlike the situation in court, the agency may not move to dismiss an administrative proceeding because of the employee's failure to make out a *prima facie* case. The employee's only burden is to file an administrative complaint and to furnish any information available to him. This filing sets into motion the entire investigative hearing mechanism, which cannot be terminated before the agency has responded to the charges of discrimination and produced all relevant evidence within its possession. The complaints examiner is then obliged to "evaluate the evidence contained in the investigative file and in the transcript of the hearing in the light of the agency's responsibility under the Act and the Executive Order," Office of Federal Equal Employment Opportunity *Discrimination Complaints Examiners Handbook* 56–57 (1973), and must require the agency to produce evidence rebutting a finding of discrimination whenever it appears that there has been disparate treatment based on race, color, religion, sex, or national origin. If the agency cannot persuade the examiner that it acted for a non-discriminatory reason, the examiner is required to find for the complainant. *Id.* at 62.

Federal Title VII administrative proceedings also differ significantly from arbitrations by permitting cross-examination, by requiring testimony under oath and decisions based on written findings of fact, and by allowing the complainant (and not another party such as the union, which may have adverse interests) to control the presentation of his case.[38] See *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 58, n. 19. Administrative hearings under the Civil Service Commission's Equal Opportunity Regulations thus are not hindered by the limitations of scope that make arbitral proceedings ineffective as a possible forum for the resolution of Title VII rights.

Although petitioner and *amicus* allege numerous deficiencies in the Commission's procedures, the short answer to these contentions is that if these alleged deficiencies in fact exist and produce an unfair result in a given case, the courts have full power to reverse the administrative decision and to require adjustment and correction of the improper practice.[39] See 5 U.S.C.

[38] In another effort to analogize federal Title VII proceedings to the arbitration involved in *Alexander*, *amicus* contends that the agency, not the complainant, controls the administrative process (Br. 27–29). Obviously in any such proceeding the agency will "control" in the sense that there will normally be no judicial involvement during the course of the administrative process. This Court's concern in *Alexander*, however, was that the union had "control over the manner and extent to which an individual grievance is presented." 415 U.S. at 58, n. 19. At the administrative hearing provided by Civil Service Commission regulations, the complainant has complete authority over the way his complaint is presented. And again, any error in the conduct of the hearing subjects the decision to reversal by the reviewing court.

[39] For example, if a complainant makes a reasonable request for relevant information in the possession of the agency and the

706(2)(D); *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 339–340. A district court, for example, has recently invalidated Commission rules that effectively prohibited administrative class actions. *Barrett* v. *United States Civil Service Commission,* D. D.C., Civ. No. 74–1694, decided December 10, 1975.[40] In the ordinary case, however, there is no reason why the Commission's procedures are incapable of building a full and fair record, which may be adequately reviewed by a court, and there is no basis for assuming that the complaints examiner, who compiles the record and

request is arbitrarily denied, remand or supplementary judicial proceedings may be necessary. A proper pre-hearing investigation by a disinterested investigator (see 5 C.F.R. 713.216), however, should normally eliminate the need for an employee to request additional information.

[40] The Civil Service Commission has now approved in concept the propriety of administrative class actions, and we expect that draft regulations implementing *Barrett* will be published before the end of February 1976. Even without formal class actions, however, the Commission has considered statistical evidence of discrimination in adjudicating complaints, and possesses the power to remedy systemic or class-wide bias on the administrative level. Present regulations instruct the pre-hearing investigator to compile statistical data on "the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group," 5 C.F.R. 713.216(a), and such data also are collected in conjunction with agency affirmative action programs. 5 C.F.R. 713.302. This evidence has been used on appropriate occasions by complaints examiners, agency heads, and the Commission's Appeals Review Board. See, *e.g.*, *Evans* v. *Lynn,* D. D.C. Civ. No. 630–73, decided October 24, 1974. Nevertheless, the propriety of administrative class actions has no bearing on the precise issue here—whether judicial review should be confined to the administrative record in normal federal Title VII cases. Review may be based on the administrative record whether or not class actions are permitted, especially when a pattern or practice of discrimination in an agency is alleged.

judges demeanor and credibility, will not be impartial. (Here, she ruled in petitioner's favor.) In addition, since employment discrimination cases ordinarily turn on the testimony of members of the affected agency, the examiner's power to compel the testimony of any federal employee should suffice in all but a relatively few, atypical cases of alleged discrimination. 5 C.F.R. 713.218(e).

We recognize that in certain unusual instances the statutory scheme may render the administrative procedures structurally incapable of developing an adequate record. If an essential witness is not a government employee, and he refuses to attend the hearing, there is no subpoena power to require his attendance. In such instances, a supplementary hearing in the district court, or even a trial *de novo*, may be required. Similarly, when an administrative complaint has not been timely processed and the employee brings suit under the 180-day provision of Section 717(c), there may have been no opportunity for an administrative hearing, and hence the courts would not have any administrative record to review. Again, of necessity, a trial *de novo* may be required.[41] But these execptions should not dictate the rule (see S. Rep. No. 92–415, *supra,* at 23; Legislative History at 432), and where, as here, the claimant's rights have not been shortchanged and an exhaustive administrative complaint file exists, a trial *de novo* would be inappropriate. As we have shown, there is no basis, either in

[41] As we discuss *infra*, p. 72, n. 46, in appropriate cases a stay of the judicial proceedings may be proper to permit completion of the agency record.

the structure of the administrative mechanism or in the results produced on the administrative level since 1972, for petitioner's pervasive assumption that no meaningful adjudication of federal Title VII rights can be achieved other than by *de novo* judicial review.

3. The foregoing discussion illustrates that the administrative process can compile a full and fair evidentiary record in the ordinary federal Title VII case. Important policy considerations strongly support a rule confining judicial review in such a case to the administrative record.

As we have previously noted, the 1972 Amendments expressly indicate the intention of Congress that the Civil Service Commission and the agencies have primary responsibility for enforcing nondiscrimination in federal employment. Section 717(a) provides that "[a]ll personnel actions affecting [federal] employees or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin," and subsection (b) provides that "[e]xcept as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a)." Subsection (e) further provides that "[n]othing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment * * *."

To permit *de novo* proceedings following agency determinations would significantly diminish the important responsibility placed upon the agencies and the Civil Service Commission by statute and would

severely erode efforts to strengthen an administrative process that has been specifically designed to discharge that responsibility. Obviously, a decision maker whose entire fact-finding and deliberative processes may be disregarded or repeated *de novo* often will not be as likely to proceed with the same care as one whose findings are subject to scrutiny, and due deference, on review. Moreover, an absolute right to trial *de novo* in the district court would decrease a complainant's incentive to prosecute his administrative claim vigorously, thus tending to frustrate the congressional determination to retain the agencies and the Civil Service Commission as the key influence in eliminating discrimination in federal employment. And, because an invariable right to trial *de novo* would preclude judicial review and correction of the agency and Commission processes, it would sacrifice the improvement of administrative proceedings that inevitably accompanies penetrating and regular court scrutiny of their fairness, efficacy, and efficiency, and would thus tend to fulfill petitioner's and *amicus'* allegations that such proceedings are inadequate and incapable of enforcing Title VII rights. See Jaffe & Nathanson, *Administrative Law* 31 (3d ed. 1968) ("[j]udicial review, however seldom invoked, casts a long shadow, both before and after it"); Jaffe, *Judicial Control of Administrative Action, supra,* at 189–190.

Review on the administrative record also avoids needless duplication of effort and promotes a prompt resolution of discrimination disputes. A prolonged civil rights employment controversy harms all concerned—not only the complaining employee but also his superiors in the agency charged with discrimination, who must continue to work with each other during the course of the dispute. Judicial review on the administrative record obviously produces a faster and less costly resolution of such disagreements than does the conducting of an essentially duplicative trial *de novo.*

The number of federal Title VII cases is large.[42] Of course, if federal employees had no fair means of enforcing their Title VII rights other than in a plenary judicial trial, the very heavy burden on the federal court system imposed by permitting *de novo* court proceedings in all federal employee cases would not be a significant consideration. But where, as here, aggrieved federal employees are entitled to a complete administrative hearing at which they can present and cross-examine witnesses under oath and on the record, a requirement of *de novo* review would wastefully and unnecessarily burden the district courts.

Courts which have held that federal employees are entitled to a trial *de novo* regardless of the underlying circumstances have attempted to minimize the needless duplication of effort by noting that the district judge may always exclude redundant testimony and may grant summary judgment under Rule 56, Fed. R. Civ. P., in appropriate cases. See, *e.g., Hackley* v.

[42] We cannot state with certainty the precise number of these cases, but the Civil Service Commission participated in the defense of more than 200 federal employee Title VII cases in the district courts in fiscal year 1975 alone. This appears to be a conservative indication of the number of such suits now pending. See also p. 36, n. 17, *supra.*

Roudebush, 520 F. 2d at 157 (opinion of the court) and 171 (Leventhal, J., concurring). While theoretically true, this point ignores the fact that employment discrimination allegations often may involve issues of fact that can be determined only after a personal assessment of the credibility of witnesses. In such cases, as the District of Columbia Circuit has conceded, testimony heard by a complaints examiner and recorded verbatim would have to be retaken. 520 F. 2d at 157 (opinion of the court) and 171 (Leventhal, J., concurring). These suggested remedies would also be unworkable if a witness, called for the first time in the district court proceeding, gives testimony that requires the recall of witnesses who had previously testified at the administrative level.

In judicial review of an adjudicatory administrative determination based upon a hearing, Congress has empowered the courts to set aside agency action that is arbitrary, capricious, or "unsupported by substantial evidence." 5 U.S.C. 706(2).[43] This standard takes account of the expertise and primary responsibility of the agency and, by clearly defining the respective roles of the administrator and judge, prevents duplication of effort, yet it ensures that agency decisions will be supported by the evidence adduced, procedurally correct, and in accordance with the applicable law. Substantial evidence review of the administrative rec-

[43] See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414–415; *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50–51; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 40–41.

ord is a process with which courts are familiar." It is far from a "rubber stamp." *National Labor Relations Board* v. *Brown, supra,* 380 U.S. at 291. Issues of law and procedure are of course reviewable independently, and if the district court cannot find that the evidence supporting the administrative decision is substantial, it must reverse.[45] *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488. Moreover, if the agency or Civil Service Commission has rejected findings of the independent complaints examiner, the court may take this into consideration in determining whether the substantial evidence standard has been met. See *Universal Camera Corp.* v. *National Labor Relations Board, supra,* 340 U.S. at 496–497; *National Labor Relations Board* v. *Universal Camera Corp.,* 190 F. 2d 429, 430 (C.A. 2).

All of these considerations, we submit, lead to the conclusion that judicial review in the ordinary federal

[44] Significantly, when this Court determined in *McDonnell Douglas* and *Alexander* that court proceedings should be *de novo* in the private sector following EEOC investigations or union arbitration awards, the alternative was not substantial evidence review of a hearing record and administrative findings of fact, but rather *deferral* to the previous decision or, indeed, *preclusion* of district court jurisdiction altogether.

[45] *Amicus* (Br. 11–12, n. 10) alleges that no district court applying less than *de novo* review has overturned an administrative decision and granted summary judgment to a plaintiff. This statement is incorrect, See, *e.g.*, *Napper* v. *Schnipke*, 393 F. Supp. 379 (E.D. Mich.); *Robinson* v. *Warner*, 8 EPD ¶ 9452 (D. D.C.); *Day* v. *Weinberger, supra; Davis* v. *Department of Health, Education and Welfare*, 10 EPD ¶ 10,341 (E.D. La.); *Palmer* v. *Rogers*, 10 EPD ¶ 10,265 (D. D.C.); *Rios* v. *Morton*, D. Colo., Civ. No. C–5499, decided September 25, 1975.

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Title VII case should be limited to the administrative record. An aggrieved employee presumptively would be given a full and fair opportunity to present his case and to build a record on the administrative level, and if he demonstrates that he did not in fact receive that opportunity the reviewing court would reverse the administrative decision. In those rare instances, discussed above, where judicial review cannot adequately be bottomed on the administrative record, the district court possesses the discretion to entertain supplementary proceedings, including trial *de novo* where appropriate, while according the administrative record the great weight that it deserves. Cf. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 60, n. 21.[46]

D. THE JUDGMENT BELOW IS CORRECT

Under the standard we have urged above, the court of appeals was correct in concluding that petitioner

[46] Trial *de novo*, for example, would normally be required (at least in the absence of an agency decision before trial) when suit has been instituted after the expiration of 180 days from the filing of an administrative complaint without final agency action. In circumstances which show that the complainant has delayed the administrative process, however, it would be consistent with the dual congressional purpose of giving the agency primary responsibility for the elimination of employment discrimination, while encouraging speedy agency action, to permit the agency to seek a stay of the court proceedings. The agency would be required to demonstrate that it has been acting with due diligence, that it anticipates issuance of an order within a resonable time, and that the case or order is exceptional. Such a procedure was originally incorporated into the federal employee provisions of the Senate Committee Bill, but was inadvertently eliminated when the EEOC authority to hold administrative hearings was removed. See *supra*, pp. 44–45, n. 22.

was not entitled to a trial *de novo* in the district court and that the judgment should be affirmed. This suit was filed within 30 days of receipt of notice of final action by the Civil Service Commission based upon a complete administrative record, and thus does not involve the 180-day provisions of Section 717(c). Moreover, petitioner requested and received a full evidentiary hearing before a complaints examiner.

Nor does the record indicate that exercise of district court subpoena power would have produced evidence supporting petitioner's discrimination claim. As the court below noted, "there was no offer of proof or suggestion that new and material evidence likely to produce a different result would be forthcoming if the record were reopened" (515 F. 2d at 255; Pet. App. 41a). The selecting official testified at length and was subject to cross-examination (A.R. 56–69). Moreover, all of the hearing witnesses requested by petitioner were government employees and therefore within the complaints examiner's power to compel them to testify (A.R. 143–145). 5 C.F.R. 713.218(e).

Although the examiner initially disapproved 19 of the 24 witnesses requested by petitioner because their expected testimony did not appear to be relevant to the issue of whether petitioner had been discriminated against (A.R. 118, 141), the examiner reconsidered and approved 4 of the 19 previously-excluded witnesses (A.R. 118).[47] It is true that one of these, Mrs.

[47] The complaints examiner's decision not to summon several of petitioner's proposed witnesses itself reflects no procedural unfairness. Even in court a party has no right to call every witness

Murrell Long, did not appear because she did not wish to testify (A.R. 118), but she had been suggested as a witness only because she assertedly had "[r]efused to sign [a] deposition given under oath by the EEO Investigator" (A.R. 144). There is no indication in the administrative record that Mrs. Long would have given evidence supportive of petitioner's discrimination claim, that petitioner requested the hearing examiner to produce Mrs. Long through further administrative procedures, or that petitioner complained of the absence of Mrs. Long's live testimony on appeal to the Civil Service Commission. Similarly, the examiner's decision not to call Mr. Dineros, the person selected instead of petitioner, was within her discretion. Although petitioner contends that the selectee could have testified to his qualifications for the job of Supervisory Claims Examiner, those qualifications were not themselves in issue at the hearing; the significant factor was the good faith belief of the members of the selecting panel and the selecting official that Mr. Dineros was better qualified.[48] Each member of the panel and the selecting official testified fully at the administrative hearing.

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he desires. See, *e.g.*, *May* v. *United States*, 175 F. 2d 994, 1010 (C.A.D.C.), certiorari denied, 338 U.S. 830; *Gajewski* v. *United States*, 321 F. 2d 261 (C.A. 8), certiorari denied, 375 U.S. 968. The examiner's refusal in this case to allow testimony by persons with no apparent knowledge of the contested issues was consistent with the discretionary power frequently exercised by trial courts.

[48] For example, if the selecting official had chosen a person other than petitioner in the honest belief that that person was more

Accordingly, no special circumstances exist that would justify a departure from the usual substantial evidence review of the administrative record, and petitioner was properly refused a trial *de novo*. While the district court and the court of appeals in this case apparently applied a somewhat broader standard of review than that which we suggest is applicable, both courts found that the administrative decision was based upon the weight of the evidence, that agency procedures were adequate, and that there were no errors of law. These conclusions are fully supported by the record. The decision below is therefore correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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qualified, and if that decision was in no way influenced by consideration of race, color, religion, sex, or national origin, petitioner would not be entitled to relief *under Title VII* even if she in fact were more capable to fill the position than the selectee.

APPENDIX A

CIVIL RIGHTS ACT OF 1964 AS AMENDED

AN ACT To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY[1]

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions*, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code)*, *or* (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, *except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972*, persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers*.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the

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[1] Includes 1972 amendments made by P.L. 92-261 printed in italic.

purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) *twenty-five* or more during the first year after the *date of enactment of the Equal Employment Opportunity Act of 1972, or* (*B*) *fifteen* or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, *except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the excercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of

the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's, religious observance or practice without undue hardship on the conduct of the employer's business.

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its *activities.*

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit. segregate, or classify its membership, *or applicants for membership* or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, *or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs*, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment *agency, or joint labor-management committee controlling apprenticeship or other training or retraining, in-*

cluding on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment *agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee* indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. *Members of the Commission* shall be appointed by the President by and with the advice and consent of the *Senate* for a term of five *years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.* The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and *except as provided in subsection (b)*, shall appoint, in accordance with the *provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: Provided, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.*

(b)(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to *intervene* in a civil action brought *under section 706* by an aggrieved party *against a respondent other than a government, governmental agency, or political subdivision.*

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) *The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.*

(b) Whenever *a charge is filed by or on behalf of a* person claiming to be aggrieved, or by a member of the Commission, *alleging* that an employer, employment agency, labor *organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,* has engaged in an unlawful employment practice, the Commission shall *serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on* such employer, employment agency, labor *organization, or joint labor-management committee* (hereinafter referred to as the "respondent") *within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges* shall not be made public by the Commission. If the Commission *determines* after such investigation that there is *not* reasonable cause to believe that the charge is true, *it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,* the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such *informal* endeavors may be made public by the *Commission, its officers or employees, or used as evidence in a subsequent proceeding* without the written consent of the *persons concerned.* Any *person* who *makes* public information in violation of this subsection shall be fined not more than $1,000 or imprisoned *for* not more than one *year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) from the date upon which the Commission is authorized to take action with respect to the charge.*

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts

upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective *date* of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under *this section* shall be filed within *one hundred and eighty* days after the alleged unlawful employment practice *occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter,* except that in *a* case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof,* such charge shall be filed by *or on behalf of* the person aggrieved within *three hundred* days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) *or* (d), the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission,* the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a*

case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission,* or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) *or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under *this section*, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under *this section* and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a

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complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9, of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all

court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, *engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and* utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, *pay by advance or reimbursement* such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) *Every* employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable,

necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and *to* furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, *and, if such application for an exemption is denied*, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. *If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.*

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of

the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under the section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of *sections 111 and 1114* title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. *Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official*

functions under this Act shall be punished by imprisonment for any term of years or for life.

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of

the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department

agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISIONS WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

APPENDIX B

THE CIVIL SERVICE COMMISSION'S EQUAL OPPORTUNITY REGULATIONS

PART 713—EQUAL OPPORTUNITY

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Subpart B of Part 713 Equal Opportunity is revised to implement the Equal Employment Opportunity Act of 1972, 86 Stat. 103, and to strengthen the system of complaint processing. Among others, these changes emphasize the affirmative aspects of agency equal employment opportunity obligations, set out requirements for submission of national and regional plans, extend the time limits for contacting a counselor, provide for the reasonable accommodation to the religious needs of applicants and employees, provide for timely investigation and resolution of complaints including complaints of coercion and reprisal, set out the remedial action available(including back pay), and strengthen the third party complaint system.

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AUTHORITY: The provisions of this Subpart B issued under 5 U.S.C. 1301, 3301, 3302, 7151–7154, 7301; 86 Stat. 111; E.O. 10577; 3 CFR, 1934–58 Comp., p. 218, E.O. 11222, 3 CFR 1964–1965 Comp., p. 306, E.O. 11478, 3 CFR 1969 Comp.

SUBPART B—EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

General Provisions

§ 713.201 PURPOSE AND APPLICABILITY

(a) Purpose. This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's decision or other final action on his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

(b) Applicability. (1) This subpart applies: (i) To military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, the U.S. Postal Service, and the Postal Rate Commission, and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

§ 713.202 GENERAL POLICY

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to pro-

hibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

§ 713.203 AGENCY PROGRAM

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employee by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior acomplishment in equal employment opportunity;

(i) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

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§ 713.204 IMPLEMENTATION OF AGENCY PROGRAM

To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary tc carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in § 713.202 and its program established in accordance with § 713.203;

(c) Designate a Director of Equal Employment Opportunity and as many Equal Opportunity Officers, Equal Employment Opportunity Counselors, Federal Women's Program Coordinators, and other persons as may be necessary, to assist the head of the agency to carry out the functions described in this subpart in all organizational units and locations of the agency. The functioning and the qualifications of the persons so designated shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

(d) Assign to the Director of Equal Employment Opportunity the functions of;

(1) Advising the head of his agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports, and other matters pertaining to the policy in § 713.202 and the agency program required to be established under § 713.203;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or

disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under § 713.214;

(5) Providing for the receipt and investigation of individual complaints of discrimination in personnel matters within the agency, subject to §§ 713.211 through 713.222;

(6) Providing for the receipt, investigation, and disposition of general allegations by organizations or other third parties of discrimination in personnel matters within the agency subject to § 713.251.

(7) When authorized by the head of the agency, making the decision under § 713.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing at his

discretion, the record on any complaint before the decision is made under § 713.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or applicant for employment must consult the Counselor as provided by § 713.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by § 713.214 may be filed; and

(4) Time limits for contacting an Equal Employment Opportunity Counselor.

(g) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by substitution of another qualified employee, by a grant of leave, a change of a tour of duty, or other means) without undue hardship on the business of the agency. If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so; and

(h) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity.

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to—

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

§ 713.205 COMMISSION REVIEW AND EVALUATION OF AGENCY PROGRAM OPERATIONS

The Commission shall review and evaluate agency program operations periodically, obtain

such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in § 713.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart. The head of each department and agency shall comply with the rules, regulations, orders, and instructions issued by the Commission.

Agency Regulations for Processing Complaints of Discrimination

§ 713.211 GENERAL

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, or national origin comply with the principles and requirements in §§ 713.212 through 713.222.

§ 713.212 COVERAGE

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with that agency who believes that he has been discriminated against because of race, color, religion, sex, or national origin. A complaint may also be filed by an organization for the aggrieved person with his consent

(b) Sections 713.211 through 713.222 do not apply to the consideration by an agency of a general allegation of discrimination by an organization or other third party which is unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222. (Section 713.251 applies to general allegations by organizations or other third parties.)

§ 713.213 PRECOMPLAINT PROCESSING

(a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of his counseling activities so as to brief periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing his actions and advice both to the agency and the aggrieved person concerning the issues in the matter. The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to his attention by the aggrieved person. If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the aggrieved person, shall be informed in writing at that time of his right to file a complaint of discrimination. The notice shall inform the complainant of his right to file a complaint at any time after receipt of the notice up to 15 calendar days after the final interview (which shall be so identified in writing by the Equal Employment Opportunity Counselor) and the appropriate official with whom to file a complaint. The Counselor shall not attempt in any way to re-

strain the aggrieved person from filing a formal complaint. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who has come to him for consultation, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from him.

(b) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(c) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the peformance of his duties under this section.

§ 713.214 FILING AND PRESENTATION OF COMPLAINT

(a) Time limits. (1) An agency shall require that a complaint be submitted in writing by the complainant or his representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if—

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter, or, if a personnel action, within 30 calendar days of its effective date; and

(ii) The complainant or his representative submitted his written complaint to an appropriate official within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity Officer, a Federal Women's Program Coordinator, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with subparagraph (3) of this paragraph.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge to the complainant or his representative in writing receipt of the complaint and advise the complaintant in writing of all his administrative rights and of his right to file a civil action as set forth in § 713.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section: (i) When the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances bevond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency.

(b) Presentation of complaint. At any stage in the presentation of a complaint, including the counseling stage under § 713.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency

and ne designates another employee of the agency as his representative, the representative, shall have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

§ 713.215 REJECTION OR CANCELLATION OF COMPLAINT

The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of § 713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative. The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted and of his right to file a civil action as described in § 713.281.

§ 713.216 INVESTIGATION

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under

oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the

person conducting the investigation a written authorization: (1) To investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

§ 713.217 ADJUSTMENT OF COMPLAINT AND OFFER OF HEARING

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. If the agency does not carry out, or rescinds, any action specified by the terms of the adjustment for any reason not attributable to acts or conduct of the complainant the agency shall, upon the complainant's written request, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing: (1) Of the proposed disposition of complaint, (2) of his right to a hearing and decision by the agency head or his designee if he notifies the agency in writing within 15 calendar days of the receipt of the notice that he desires a hearing, and (3) of his right to a

decision by the head of the agency or his designee without a hearing.

(c) If the complainant fails to notify the agency of his wishes within the 15-day period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto and of his right to file a civil action as described in § 713.231. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complainant, together with the complaint file shall be forwarded to the head of the agency, or his designee, for decision under § 713.221.

§ 713.218 HEARING.

(a) Complaints examiner. The hearing shall be held by a complaints examiner who must be an employee of another agency except when the agency in which the complaint arose is: (1) The government of the District of Columbia, or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as complaints examiner. (For purposes of this paragraph, the Department of Defense

is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of a complaints examiner who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) Arrangements for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in § 713.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the complaints examiner in making his recommended decision on the complaint), to the complaints examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the complaints examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of § 713.216 apply to any further investigation by the agency on the complaint. The complaints examiner shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1) Attendance at the hearing is limited to persons determined by the complaints examiner to have a direct connection with the complaint.

(2) The complaints examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the complaints examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the

representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of complaints examiner. In addition to the other powers vested in the complaints examiner by the agency in accordance with this subpart, the agency shall authorize the complaints examiner to:

(1) Administer oaths or affirmations;
(2) Regulate the course of the hearing;
(3) Rule on offers of proof;
(4) Limit the number of witnesses whose testimony would be unduly repetitious; and
(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(e) Witnesses at hearing. The complaints examiner shall request any agency subject to this subpart to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He may also request the appearance of an employee of any Federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The complaints examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the complaints examiner and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the complaints examiner. If the explanation is inadequate, the

complaints examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the complaints examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. An employee of an agency shall be in a duty status during the time he is made available as a witness.

(f) Record of hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the complaints examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

(g) Findings, analysis, and recommendations. The complaints examiner shall transmit to the head of the agency or his designee: (1) The complaint file (including the record of the hearing), (2) the findings and analysis of the complaints examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the complaints examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The complaints examiner shall notify the complainant of the date on which this was done. In addition, the complaints examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

§ 713.219 RELATIONSHIP TO OTHER AGENCY APPELLATE PROCEDURES

(a) Except as provided in paragraphs (b) and (c) of this section, when an employee makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under a grievance or appeals system of the agency, the agency may process the allegation of discrimination under that system when the system meets the principles and requirements in §§ 713.212 through 713.220 and the head of the agency, or his designee, makes the decision of the agency on the issue of discrimination. That decision on the issue of discrimination shall be incorporated in and become a part of the decision on the grievance or appeal.

(b) An allegation of discrimination made in connection with an appeal under Subpart B of Part 771 of this chapter shall be processed under that subpart.

(c) An allegation of discrimination made in connection with a grievance under Subpart C of Part 771 of this chapter shall be processed under this part.

§ 713.220 AVOIDANCE OF DELAY

(a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved within 180 calendar days after it was filed, including time spent in the processing of the complaint by the complaints examiner under § 713.218.

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(b) The head of the agency or his designee may cancel a complaint if the complainant fails to prosecute the complaint without undue delay. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(c) The agency shall furnish the Commission monthly reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply a complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to insure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 calendar days after the date the complaint was filed, the complaints examiner's recommended decision shall become a final decision binding on the agency 30 calendar days after its submission to the agency. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the complaints examiner under § 713.218(g) and a copy of the hearing record and also shall notify him in writing of his right

of appeal to the Commission and the time limits applicable thereto and of his right to file a civil action as described in § 713.281.

§ 713.221 DECISION BY HEAD OF AGENCY OR DESIGNEE

(a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing and shall be transmitted by letter to the complainant and his representative. When there has been no hearing, the decision shall contain the specific reasons in detail for the agency's action, including any remedial action taken.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the complaints examiner under section 713.218(g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the complaints examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejection or modification.

(3) When there has been no hearing and no decision under § 713.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall require

remedial action to be taken in accordance with § 713.271, shall review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and shall record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be included in the complaint file.

(d) The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission of his right to file a civil action in accordance with § 713.281, and of the time limits applicable thereto.

§ 713.222 COMPLAINT FILE

The agency shall establish a complaint file. Except as provided in § 713.221(c), this file shall contain all documents pertinent to the complaint. The complaint file shall include copies of: (a) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under § 713.213(a), (b) the written report of the Equal Employment Opportunity Counsel under § 713.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, (c) the complaint, (d) the investigative file, (e) if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, (f) if adjustment of the complaint is arrived at under § 713.217, the written record of the terms of the adjustment, (g) if no adjustment of the complaint is arrived at under § 713.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, (h) if decision is made under §713.217(c), a copy of the letter to the complainant transmitting that decision, (i) if a hearing was held, the record of the hearing, together with the complaints ex-

aminer's findings, analysis, and recommended decision on the merits of the complaint, (j) if the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by him to the head of the agency or his designee, and (k) if decision is made under § 713.221, a copy of the letter transmitting the decision of the head of the agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under § 294.401 of this chapter.

APPEAL TO THE COMMISSION

§ 713.231 ENTITLEMENT

(a) Except as provided by paragraph (b) of this section, a complainant may appeal to the Commission the decision of the head of the agency, or his designee:

(1) To reject his complaint, or a portion thereof, for reasons covered by § 713.215; or

(2) To cancel his complaint because of the complainant's failure to prosecute his complaint; or

(3) On the merits of the complaint, under § 713.217(c) or § 713.221, but the decision does not resolve the complaint to the complainant's satisfaction.

(b) A complainant may not appeal to the Commission under paragraph (a) of this section when the issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the Commission.

§ 713.232 WHERE TO APPEAL

The complainant shall file his appeal in writing, either personally or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415.

§ 713.233 TIME LIMIT

(a) Except as provided in paragraph (b) of this section, a complainant may file an appeal at any time after receipt of his agency's notice of final decision on his complaint but not later than 15 calendar days after receipt of that notice.

(b) The time limit in paragraph (a) of this section may be extended in the discretion of the Board of Appeals and Review, upon a showing by the complainant that he was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

§ 713.234 APPELLATE PROCEDURES

The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board. The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282.

§ 713.235 REVIEW BY THE COMMISSIONERS

The Commissioners may, in their discretion, reopen and reconsider any previous decision

when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued:

(2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

§ 713.236 RELATIONSHIP TO OTHER APPEALS

When the basis of the complaint of discrimination because of race, color, religion, sex, or national origin involves an action which is otherwise appealable to the Commission and the complainant having been informed by the agency of his right to proceed under this subpart elects to proceed by appeal to the Commission, the case, including the issue of discrimination, will be processed under the regulations appropriate to that appeal when the complainant makes a timely appeal to the Commission in accordance with those regulations.

REPORTS TO THE COMMISSION

§ 713.241 REPORTS TO THE COMMISSION ON COMPLAINTS

Each agency shall report to the Commission information concerning precomplaint counseling and the status and disposition of complaints under this subpart at such times and in such manner as the Commission prescribes.

THIRD PARTY ALLEGATIONS

§ 713.251 THIRD-PARTY ALLEGATION OF DISCRIMINATION

(a) Coverage. This section applies to general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint of discrimination subject to §§ 713.211 through 713.222.

(b) Agency procedure. The organization or other third party shall state the allegation with sufficient specificity so that the agency may investigate the allegation. The agency may require additional specificity as necessary to proceed with its investigation. The agency shall establish a file on each general allegation, and this file shall contain copies of all material used in making the decision on the allegation. The agency shall furnish a copy of this file to the party submitting the allegation and shall make it available to the Commission for review on request. The agency shall notify the party submitting the allegation of its decision, including any corrective action taken on the general allegations, and shall furnish to the Commission on request a copy of its decision.

(c) Commission procedures. If the third party disagrees with the agency decision, it may, within 30 days after receipt of the decision, request the Commission to review it. The request shall be in writing and shall set forth with particularity the basis for the request. When the Commission receives such a request, it shall make, or require the agency to make, any additional investigations the Commission deems necessary. The Commission shall issue a decision on the allegation ordering such corrective action, with or without back pay, as it deems appropriate.

FREEDOM FROM REPRISAL OR INTERFERENCES

§ 713.261 FREEDOM FROM REPRISAL

(a) Complainants, their representatives, and witnesses shall be free from restraint interference, coercion, discrimination, or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under section 713, or any time thereafter.

§ 713.262 REVIEW OF ALLEGATIONS OF REPRISAL

(a) Choice of review procedures. A complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to §§ 713.211 through 713.222 or as a charge subject to paragraph (b) of this section.

(b) Procedure for review of charges. (1) An employee or applicant may file a charge of restraint, interference, coercion, discrimination or reprisal, in connection with the presentation of a complaint with an appropriate agency official as defined in § 713.214(a)(2) within 15 calendar days of the date of the alleged occurrence. The charge shall be in writing and shall contain all pertinent facts. Except as provided in subparagraph (2) of this paragraph, the agency shall undertake an appropriate inquiry into such a charge and shall forward to the Commission within 15 calendar days of the date of its receipt a copy of the charge and report of action taken. The agency shall also provide the charging party with a copy of the report of action taken. When the agency has not completed an appropriate inquiry 15 calendar days after receipt of such a charge, the

charging party may submit a written statement with all pertinent facts to the Commission, and the Commission shall require the agency to take whatever action is appropriate.

(c) When a complainant, after completion of the investigation of his complaint under § 713.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegation as an issue in the complaint at hand or refer the matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

Remedial Actions

§ 713.271 REMEDIAL ACTIONS

(a) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Backpay, computed in the same manner prescribed by § 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the backpay he would have received, computed in the same manner prescribed by § 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for nonselection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of backpay shall be made.

(4) A period of retroactivity or a period for which backpay is awarded under this paragraph may not extend from a date earlier than 2 years prior to the date on which the complaint was initially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which

backpay is awarded this paragraph may not extend earlier than 2 years prior to the date the finding of discrimination was recorded.

(b) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

Right To File a Civil Action

§ 713.281 STATUTORY RIGHT

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate U.S. District Court within:

(a) Thirty (30) calendar days of his receipt of notice of final action taken by his agency on a complaint.

(b) One hundred-eighty (180) calendar days from the date of filing a complaint with his agency if there has been no decision.

(c) Thirty (30) calendar days of his receipt of notice of final action taken by the Commission on his complaint, or,

(d) One hundred-eighty (180) calendar days from the date of filing an appeal with the Commission if there has been no Commission decision.

§ 713.282 NOTICE OF RIGHT

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§ 713.215 and 713.217, or § 713.221. The Commission shall notify an employee or applicant of his right to file a civil

action, and of the 30-day time limit for filing, in any decision under § 713.234.

§ 713.283 EFFECT ON ADMINISTRATIVE PROCESSING

The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

UNITED STATES CIVIL SERVICE COMMISSION,

[SEAL] JAMES C. SPRY,

Executive Assistant to the Commissioners.

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OCTOBER TERM, 1975

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RICHARD L. ROUDEBUSH.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf.

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* Letters of consent to the filing of this Brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving Title VII of the Civil Rights Act of 1964 and discrimination in employment generally.* Since the amendment of Title VII in 1972 to cover federal employees, LDF has become involved in cases raising a variety of procedural and substantive issues in actions brought under both Title VII and other statutes on behalf of federal employees.** In most of our cases the specific issue involved here—the right to a trial so-called *de novo*—is involved. Thus, LDF and its clients have an immediate interest in the resolution of this important issue.

Summary of Argument

I.

In amending Title VII of the Civil Rights Act of 1964 to extend its protections to employees of the federal government, Congress intended to give federal employees the

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* *E.g., Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L.Ed.2d 280 (1975).

** *E.g., Brown* v. *G.S.A.*, No. 74-768; *Place* v. *Weinberger*, No. 74-116; *Salone* v. *United States*, No. 74-1600.

same rights as those enjoyed by employees of private companies and state and local governments. A central principal in the statutory scheme embodied in Title VII is that there is a variety of overlapping and independent remedies available to eradicate discrimination in employment. The central role in enforcement has been given to the federal courts. Therefore, federal employees are entitled to the same plenary trial pursuant to the Federal Rules of Civil Procedure as are all other employees. Only in this way can federal employees be assured of an impartial tribunal and the resolution of discrimination claims based on the application of the law of Title VII to a complete record.

II.

The administrative procedure established by regulations of the Civil Service Commission, together with either a review of or an independent determination based on but limited to the record compiled administratively is no substitute for a plenary trial in federal court. The procedure suffers from the same deficiencies present in arbitration proceedings that were noted by this Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). These include the absence of a fact finding apparatus comparable to that in federal court, the failure to follow Title VII law, and the ultimate fact finding and decision-making power being in the hands of an interested party. Thus, under the standards of *Alexander*, the record made in such a proceeding is entitled to no special deference, but may, of course, be introduced into evidence to be given whatever weight may be appropriate.

ARGUMENT

I.

Prior Decisions Of This Court Require That Federal Employees Be Afforded A Plenary Trial in Federal Court.

The issue presented by this case—whether a federal employee[1] who brings a civil action under Title VII of the Civil Rights Act of 1964[2] is entitled to the same plenary judicial trial, or "trial *de novo*", as it has been called, as are all other employees—encompasses two questions. *First,* may evidence relevant to whether there has been discrimination other than evidence developed during an administrative proceeding be discovered and introduced in court? *Second,* should a federal court make an independent determination, based on all the available evidence, whether there has been a violation of Title VII, or must it affirm an administrative determination of no discrimination if that determination is not irrational or arbitrary, or is supported by "substantial evidence?" Essentially three rules have been adopted by the lower courts.

The Tenth Circuit, in *Salone* v. *United States,* 511 F.2d 902 (1975), *pending on petition for certiorari,* No. 74-1600, has held that if any facts other than those in the administrative record are needed, the case is to be remanded to the agency. The role of the district court is the limited review of the Administrative Procedure Act. The Ninth Circuit in the present case, and recently the Eighth Circuit

[1] Throughout this Brief the word "employee" includes applicants for employment and former employees as well as persons actually employed by the federal government.

[2] As amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261.

in *Haire* v. *Callaway,* —— F.2d ——, 11 F.E.P. Cases 769 (Nov. 17, 1975), have held with regard to the first question that the plaintiff must bear a substantial burden of demonstrating a "need" to supplement the administrative record; otherwise, no new evidence may be introduced. However, exactly how that burden is to be met is not clearly defined. With regard to the second question, the Eighth Circuit held that an independent determination as to a Title VII violation should be made, while the Ninth Circuit apparently follows the "substantial evidence" rule.

The three other circuits that have ruled on these issues have held that a federal employee is entitled to proceed under Title VII in the same way as any other employee under the rule of *Alexander* v. *Gardner Denver Co.,* 415 U.S. 36 (1974). *Sperling* v. *United States,* 515 F.2d 465 (3rd Cir. 1965), *petition for a writ of certiorari pending,* No. 75-247; *Caro* v. *Schultz,* —— F.2d ——, 10 E.P.D. ¶ 10,381 (7th Cir. 1975); *Hackley* v. *Roudebush,* 520 F.2d 108 (D.C. Cir. 1975). Thus, he need not meet the *Chandler* and *Haire* burden of demonstrating a need "before he can exercise procedures routinely accorded to civil litigants." *Hackley* v. *Roudebush,* 520 F.2d at 171. Just like an arbitrator's decision under *Alexander,* the record of the administrative process may be admitted "for whatever weight the trial judge wishes to accord it," and the court may exercise the normal power over discovery to avoid unnecessary duplication. 520 F.2d at 150-151.

The Department of Justice has, in the lower courts, argued, in essence, for the *Salone* rule; *i.e.,* no new evidence may be introduced in court, and there is a limited scope of review.[3] *Amicus* urges that the result reached by the

[3] In response to an inquiry at oral argument in the case of *Oringel* v. *Matthews,* 5th Cir. No. 74-3971, the Department of Justice has informed the court that its position is that "since [42 U.S.C. 2000e-16] does not define the scope of judicial review or

Third, Seventh and District of Columbia Circuits is clearly correct, and is compelled by the face of the statute (42 U.S.C. § 2000e-16), its legislative history, purpose, and the decisions of this Court in *Alexander* v. *Gardner Denver Co., supra; McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Morton* v. *Mancari,* 417 U.S. 535 (1974).

Alexander v. *Gardner-Denver Co.,* and *McDonnell Douglas Corp.* v. *Green,* at 798-99, held explicitly that a plaintiff is entitled to a full plenary trial *de novo* in a civil action maintained under the provisions of 42 U.S.C. § 2000e-5 of Title VII of the Civil Rights Act. *Alexander,* discusses at length why the ultimate responsibility for the full enforcement of Title VII rests with the federal courts and why this responsibility necessarily entails a full plenary trial. When Congress enacted the Equal Employment Opportunity Act of 1972 and amended Title VII to provide federal employees with a cause of action under it for the first time, it intended, as noted in *Morton* v. *Mancari,* at 546-47, that the substantive law of Title VII be applied to federal employees. As an integral part of ensuring that goal, Congress provided, in 42 U.S.C. § 2000e-16(c) and (d), that federal employees can bring a "civil action as provided in section 2000e-5," which action would be governed by the "provisions of section 2000e-5(f) through (k)," precisely the provisions interpreted and applied by this Court in *Alexander.* Even prior to *Alexander,* of course, the lower federal courts had generally held that a full plenary trial *de novo* was required in such actions.[4] Thus, the face of the statute leads to the conclusion that

contain any requirement of a trial *de novo,* the scope of judicial review is that provided under the Administrative Procedure Act." 5 U.S.C. § 706(2). Justice Department Memorandum in Response to Court Request, p. 1. The Department has taken the same position in *Swain* v. *Callaway,* 5th Cir. No. 75-2002.

[4] See the cases cited in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. at 799.

a federal employee receives what has been termed a trial *de novo,* a full plenary hearing in the District Court. Indeed, the only words of the statute that could possibly lead to a different conclusion, the phrase "as applicable" in § 2000e-16(d), do no more than exclude the references in 2000e-5 to the Attorney General and the Equal Employment Opportunity Commission, since those references are not "applicable" to an action brought by a private party in which the federal government is itself the defendant.[5] *Hackley* v. *Roudebush,* 520 F.2d at 120-121.

Thus, as in the private sector, Congress intended that federal employees have access to a variety of independent and overlapping remedies to attack discrimination in employment. *Alexander* v. *Gardner-Denver Co.,* 415 U.S. at 48-49; *see also, Johnson* v. *Railway Express Agency,* 421 U.S. 454, 459 (1975). The error the Eighth, Ninth, Tenth Circuits, and the government make, is to view the proceeding in federal court as an adjunct to the administrative process, dependent on and limited to it. The use of the phrase "civil action"[6] in § 2000e-16(c), and the link to the

[5] The authoritative analysis of the 1972 Amendments as reported by the House-Senate Conference Committee, explicitly states that, "The provisions of [2000e-5(f)-(k)], concerning *private civil actions* by aggrieved persons are made applicable to . . . Federal employees." Section-by-section Analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. at pp. 7169-7566 (92d Cong., 2d Sess. (1972). (Emphasis added).

[6] Had Congress intended to preclude trials *de novo,* and to limit the district courts to determining whether the agency decision was supported by substantial evidence, it would have said so explicitly. See e.g., 5 U.S.C. § 706(2)(E) ("substantial evidence" test); 15 U.S.C. § 45(c) (findings to be upheld "if supported by evidence"); 15 U.S.C. § 21(c) ("substantial evidence" test); 15 U.S.C. § 522 (facts found by agency "prima facie evidence" of those facts); 29 U.S.C. § 160(e) ("substantial evidence"); 49 U.S.C. § 16(2) (findings of commission "prima facie" evidence of facts stated therein); 21 U.S.C. § 371(f)(3) ("substantial evidence"); 21 U.S.C. § 348(g)(2) (findings to be sustained "if based upon a fair evaluation of the entire record"); 12 U.S.C. § 1848 ("substantial evidence").

provisions of 2000e-5 through 2000e-16(d), show the contrary. The fact that a federal employee must give the agency 180 days to act on his complaint as a pre-condition to his filing an action under Title VII is only an exhaustion requirement; as in any other case brought pursuant to 2000e-5, it is not a limitation on his rights once he is in federal court.[7] *McDonnell Douglas Corp.* v. *Green,* 411 U.S. at 798-99.

As explained exhaustively in *Hackley* v. *Roudebush, supra,* and by the petitioner in her brief herein, the legislative history of 2000e-16 clearly establishes, in our view, that the overriding concern of Congress was to remedy the inequitable situation of federal employees having fewer rights in federal court than all other employees.[8]

[7] The government's argument that since § 2000e-16 does not specify a "standard of review," the scope of review is that under the A.P.A., 6 U.S.C. § 706(2), is founded on the misconception that the court proceeding is one to review the administrative action, *viz.*, a "petition for review," rather than an independent civil action. This notion is belied by the fact that a Title VII plaintiff need not wait for a final agency decision as is the case before an A.P.A. proceeding may be brought, but may file before such a decision once 180 days have expired. Under those circumstances there will be nothing to review. Of course, if Congress intended an A.P.A. proceeding, it would have said so, instead of explicitly stating that the "civil action" would proceed under § 2000e-5 just as any other private action. Finally, A.P.A. review was already available, since any employee whose discrimination claim was rejected would have been a person "adversely affected or aggrieved by [final] agency action" (5 U.S.C. §§ 702, 704). See, *Chambers* v. *United States,* 451 F.2d 1045 (Ct.Cl. 1971); *Polcover* v. *Secretary of the Treasury,* 477 F.2d 1223 (D.C. Cir. 1973). Thus, to accept the government's argument would be to render § 2000e-16 (c) a virtual nullity, and 2000e-16(d) meaningless, since if the "civil action" is an A.P.A. review it is difficult to see what portions of § 2000e-5(f)-(k) would be applicable.

[8] Rather than repeat the analysis of legislative history, we respectfully refer the Court to *Hackley,* to the petition for a writ of certiorari in *Salone* v. *United States,* No. 74-1600, and to *Sperling* v. *United States,* 515 F.2d 465 (3rd Cir. 1975).

The government is left then with two arguments. One is that for "policy" reasons courts should be able to dispose of Title VII actions expeditiously. The Third Circuit in *Sperling* v. *United States,* 515 F.2d at 483-484, and the District of Columbia Circuit in *Hackley* v. *Roudebush,* 520 F.2d at 148-156 and 170-71, forcefully rejected this argument by noting that it is the responsibility of the federal courts to enforce the acts Congress has passed and not try to avoid that duty by so construing statutes as to render them ineffective. See also, *Alexander* v. *Gardner-Denver Co.,* 415 U.S. at 60, n. 21.

The second argument, and the one to which we will address ourselves in detail, is that the administrative remedy available to federal employees is "different" and "better" from that discussed in *Alexander* and so therefore *Alexander* does not apply. The conclusion the government seeks to draw is a non-sequitur because the holding in *Alexander* was that an employee is entitled to a trial in federal court. Even if he were given an administrative remedy precisely equivalent to the one in federal court, *Alexander* does not specifically hold that a federal court can evade its primary responsibility to enforce Title VII by denying a trial *de novo.* At best, the record developed in such a hypothetically equivalent administrative process would be entitled to greater evidentiary weight than would an inferior process. See, 415 U.S. at 60, n. 21. We think, however, it is obvious that the administrative remedy available to federal employees is nowhere near the equivalent of an action brought in federal court pursuant to the Federal Rules of Civil Procedure or Evidence, and will demonstrate that the defects in the procedure discussed in *Alexander* are present in the procedure established by the regulations of the Civil Service Commission. Before doing so, however, we wish to bring to the Court's attention related considera-

tions that require the conclusion that a trial *de novo* must be given as a matter of right.

As indicated in the Statement of Interest of *Amicus,* the Legal Defense Fund has been engaged in the litigation of civil rights cases in federal court for some 35 years. Since the effective date of Title VII in 1965, the Fund has played a leading role in litigating fair employment cases in federal court, both as to procedural issues and as to the merits against some of the country's largest employers. See, *e.g., Ford* v. *United States Steel,* 520 F.2d 1043 (5th Cir. 1975). In the last three years the Fund has become extensively involved in Title VII cases against the nation's largest single employer, the United States government, with a present docket of nearly 30 cases involving agencies such as the Departments of the Army, Navy, and Air Force, the National Aeronautics and Space Administration, and the Postal Service.

Our long experience in litigating civil rights cases in general, and employment discrimination cases in particular, has convinced us that it is only through full plenary trials in federal courts, with the full range of discovery available therein, that adequate determinations of the merits of employment discrimination claims can be made. Whether the case involves individual claims such as in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), or broad class problems such as *Albemarle Paper Co.* v. *Moody,* —— U.S. ——, 45 L. Ed. 2d 280 (1975), a court can properly decide the case only after the parties have had a full opportunity to unearth all the relevant facts. This can be done only if there is available to all parties (and particularly to the plaintiffs, since in the typical employment discrimination case the defendant necessarily has virtually all the relevant information in its possession), the power to subpoena witnesses both for trial and depositions, to

require the production of documents, to conduct and enforce broad discovery in the form of interrogatories and requests for admission and the other devices made available through the Federal Rules.[9]

It is also essential for the proper adjudication of the merits of such claims that it be made by a fully impartial tribunal governed by the extensive body of law developed over the last 10 years in Title VII cases. As recognized by this Court in *McDonnell Douglas Corp.* v. *Green, supra,* and *Alexander* v. *Gardner-Denver Co., supra,* the one tribunal which meets these standards is a federal court. And, it is because of this that Congress has deliberately chosen to place the ultimate responsibility for the enforcement of the vital right of equal employment opportunity in the hands of the federal courts.

The practical affect of the *Chandler-Salone-Haire* approach would be to substantially impair the effectiveness of federal courts as enforcers of Title VII. Under the government's summary judgment procedure they would serve essentially to rubber-stamp agency findings of no discrimination arrived at by a process, as will be described in detail below, that does not permit the development of full records and that is not governed by the law of Title VII.[10]

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[9] The fault in the *Chandler-Haire* approach is to put the burden on the plaintiff to show why he must conduct such discovery. In every employment discrimination case the bulk of the relevant information is necessarily in the hands of the defendant employer. A plaintiff simply cannot show what he might be able to unearth through discovery, until he has propounded and had answered appropriate interrogatories, motions to produce or inspect, and the like. Hence, as much or more so than in any other type of litigation, the normal burden under the Federal Rules to object to and demonstrate why discovery requests should *not* be complied with should be on the party required to respond.

[10] Of some 28 district court decisions by courts affording less than a *de novo* trial since 1973, in each and every case the district court refused to overturn the administrative decision and granted

Under the *Hackley* approach, on the other hand, the administrative record would still serve a useful function. Particularly where there has been an administrative hear-

summary judgment in favor of the defendants. *Salone* v. *United States*, 7 EPD ¶ 9376 (W.D. Okla. 1974); *Sperling* v. *United States*, 7 EPD ¶ 9274 (D.N.J. 1974); *Chandler* v. *Johnson*, 7 EPD ¶ 9139 (C.D. Cal. 1973); *Nimitz* v. *Berzak*, 7 EPD ¶ 9273 (E.D. La. 1974); *Hackley* v. *Johnson*, 360 F.Supp. 1247 (D.D.C. 1973); *Gautier* v. *Weinberger*, 6 EPD ¶ 9001 (D.D.C. 1973); *Tomlin* v. *Air Force Medical Center*, 369 F.Supp. 353 (S.D. Ohio 1974); *Thompson* v. *Department of Justice*, 372 F.Supp. 762 (N.D. Cal. 1974); *Bernardi* v. *Butz*, 7 EPD ¶ 9381 (N.D. Cal. 1974); *Johnson* v. *U.S. Postal Service*, 364 F.Supp. 37 (N.D. Fla. 1973); *Coopersmith* v. *Johnson*, 7 EPD ¶ 9388 (D.D.C. 1974); *Roney* v. *Saxbe*, 8 EPD ¶ 9587 (D.D.C. 1974); *Thomas* v. *Department of State*, 8 EPD ¶ 9622 (D.D.C. 1974); *Roberts* v. *Mumford*, 8 EPD ¶ 9692 (D.D.C. 1974); *Cates* v. *Johnson*, 377 F.Supp. 1145 (W.D. Pa. 1974); *Wormley* v. *Department of the Navy*, 8 FEP Cas. 1008 (N.D. Cal. 1974); *Leinster* v. *Engman*, 8 EPD ¶ 9774 (D.D.C. 1974); *McGowan* v. *United States Information Agency*, 8 EPD ¶ 9787 (D.D.C. 1974); *Allen* v. *Veterans Administration*, 8 EPD ¶ 9783 (W.D. Pa. 1974); *Caro* v. *Schultz*, 9 EPD ¶ 9987 (N.D. Ill. 1975); *Smith* v. *Gunther*, 9 EPD ¶ 9915 (D.D.C. 1975); *Marshall* v. *United States Federal Highway Administrator*, 7 EPD ¶ 9184 (D.D.C. 1973); *Smith* v. *Snyder*, 381 F.Supp. 1083 (E.D. Pa. 1974); *Ettinger* v. *Johnson*, 10 FEP Cas. 642 (E.D. Pa. 1974); *Fisher* v. *Brennan*, 10 FEP Cas. 685 (E.D. Tenn. 1974); *Haire* v. *Callaway*, 9 FEP Cas. 168 (E.D. No. 1974); *Russell* v. *Johnson*, 10 FEP Cas. 924 (W.D. Pa. 1975); *Richerson* v. *Fargo*, 10 FEP Cas. 862 (E.D. Pa. 1975).

In many of these cases the district court's decision is utterly devoid of any discussion of the facts of the case or of what evidence allegedly supports the administrative decision. In cases decided on the merits under the *de novo* standard the difference is striking; the decisions include detailed discussions of the evidence and specific findings as to disputed facts. Plaintiffs have won somewhat more than half of these cases. *Reynolds* v. *Wise*, 8 EPD ¶¶ 9777 (N.D. Tex. 1973), 9778 (N.D. Tex. 1974) (plaintiff won); *Robinson* v. *Warner*, 8 EPD ¶ 9452 (D.D.C. 1974) (court, though denying *de novo* trials generally, gave one in this case; plaintiff won); *McLaughlin* v. *Callaway*, 9 EPD ¶¶ 9888, 10,098 (S.D. Ala. 1974) (court, though denying *de novo* trials generally, gave one in this case; plaintiff won); *Levens* v. *General Services Administration*, 10 FEP Cas. 493 (W.D. Mo. 1975) (government won); *Harris* v. *Ulanich*, No. 73-369-N, E.D. Va., opinion dated November 14, 1974 (government won).

ing, it can be utilized as part of discovery and introduced in the same way depositions are. As the Court noted in *Hackley*, 520 F.2d at 150-51, Title VII plaintiffs typically do not seek delay, but rather the expeditious resolution of their claims. Thus, they would ordinarily be amenable to the proper utilization of the factual material already gathered administratively, 520 F.2d at 156-157, just as is the case in private employment litigation under *Alexander* (see, 415 U.S. at 60).

The Court should also be aware of the importance of the *de novo* issue to other questions that have arisen in Title VII litigation against the federal government, and upon whose resolution rests the effectiveness of the statute. *First*, is whether a federal employer can maintain a class action under the provisions of Rule 23, in the same way as can private and state and local government employees. See, *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280 (1975). The government has advanced a variety of reasons why such an action cannot be maintained and the question is still to be resolved by the appellate courts.[11] *Second*, is whether, in those cases brought

[11] The government has variously argued that since a trial *de novo* could not be had neither could a class action be maintained, because such a proceeding would necessarily involve the introduction of additional evidence (see, *Pointer* v. *Sampson*, 62 F.R.D. 689 (D.D.C. 1974)); that, despite this Court's holding in *Albemarle Paper Company* v. *Moody*, 45 L.Ed.2d at 294, n. 8, a class action cannot be maintained unless every member of the class has exhausted administrative remedies (Briefs for Defendants-Appellees in *Swain* v. *Hoffman*, 5th Cir. No. 75-2002, pp. 51-59; and *McLaughlin* v. *Hoffman*, 5th Cir. No. 75-2261, pp. 20-25); and that an individual plaintiff must have filed an administrative "third-party complaint" under 5 C.F.R. 713.251 as a prerequisite to maintaining a class action in federal court (see, *McLaughlin* v. *Callaway*, 382 F. Supp. 885 (S.D. Ala. 1974)). In *McLaughlin*, the government has now, however, acknowledged that the Civil Service regulations "do not permit filing of a class action administrative complaint." Brief for Defendants, p. 13.

under that provision of 42 U.S.C. § 2000e-16 that allows the filing of a court action 180 days after the filing of an administrative charge of discrimination in the absence of a final agency decision, the district court should proceed to trial, or the matter stayed or remanded to the agency for completion of the administrative process. See, *Grubbs* v. *Butz,* 514 F.2d 1323 (D.C. Cir. 1975). *Third,* is whether attorneys' fees can be awarded to a successful plaintiff. Although the government has abandoned its complete opposition to such awards in the face of the clear language of the statute that allowed an award against the government (See, Letter from Irving Jaffe, Acting Asst. Attorney General to Senator Tunney dated May 6, 1975, reprinted in C.C.H., Employment Practices Guide, ¶ 5327.), it may still take the position that attorneys' fees cannot be awarded for work done by counsel in the administrative process prior to the filing of an action under Title VII, even though the plaintiff is successful in the court action.[12] *Fourth,* is an issue arising because the regulations governing the administrative process severely restrict the kinds of cases in which either back pay or a retroactive promotion or hiring may be ordered. They impose a heavy burden on the complainant to affirmatively establish that he would have been given the job in question "but for" the presence of discrimination. In court, the government has

[12] Since the Civil Service Commission has held that there is no basis in its regulations for either the award of counsel fees or for making an attorney available to a complaining federal employee (in contrast, during the administrative process, the agency is usually represented by an attorney from its staff), if the government's position on the *de novo* question is adopted most federal employees would be limited to the record made in a proceeding where he was unrepresented by counsel. Filing an action in federal court, where under the statute counsel may be appointed or his counsel fees reimbursed, will avail him little because he will not be allowed to introduce any new evidence that his attorney might be able to develop through discovery or otherwise.

argued that this rule should govern also, a contention that so far has been rejected by the lower courts because it is contrary to Title VII law.[13] The "but for" rule argued for by the government, coupled with limiting the court to considering only the evidence developed in the administrative process would mean that virtually no federal employees would get any effective relief that would render them whole for injury suffered from discrimination. *Fifth,* the government has linked the *de novo* issue here with the question presented in *Brown* v. *General Services Administration,* No. 74-768, *i.e.,* whether Title VII is the exclusive remedy available to federal employees to correct discrimination and therefore repealed, *inter alia,* 42 U.S.C. § 1981 and the Mandamus Act. (Brief for Respondents in No. 74-768, p. 32).[14]

[13] See, discussion and citations at note 17, *infra.*

[14] There is also a subsidiary issue to the general trial *de novo* question mentioned but not resolved by the Court of Appeals in *Hackley* v. *Roudebush,* 520 F.2d 108, 158, n. 201 (D.C. Cir. 1975). In that footnote, the court suggests that if a plaintiff did not elect to have an administrative hearing or failed to put on certain evidence, he might be barred from so doing in federal court. (This issue is raised in two cases now pending before the Fifth Circuit, *Laurel* v. *United States,* 5th Cir. No. 74-3746, and *Swain* v. *Hoffman,* 5th Cir. No. 75-2002.) The Court of Appeals carefully noted that it was not deciding the issue, and, of course, it is not presented by any of the cases presently before this Court. We do wish to suggest, nevertheless, that it cannot be held that a federal employee waives his right to a full, plenary hearing in federal court if he elects to have his administrative complaint decided without a hearing. An employee, following the investigation, is informed unequivocally that he has a choice of having his complaint decided on the basis of the investigation file *or* after a hearing. In either case, he is told, he has the right to file an action in federal court after the agency decision if he is dissatisfied. There is no hint or suggestion that his rights in court will be diminished if he chooses one option rather than the other; to the contrary, the clear implication is that they will be the same. See, the suggested letter sent to complainants reproduced in App. B, p. 79a. This Court held in *Alexander* that "there can be no

II.

Under the Standards *Alexander* v. *Gardner-Denver*, the CSC Complaint Process Cannot Substitute for a Trial in Federal Court.

A. *Introduction.*

We come now to the basis of the ruling of the court below, and the government's main contention, *viz.*, that since the administrative remedy available to federal employees is different than those discussed in *Alexander* and *McDonnell Douglas Corp.* v. *Green*, the holdings of those cases do not apply. Before discussing why this contention is wrong we wish to emphasize that it is also irrelevant. As we have urged above, both the face of the statute and its legislative history demonstrate that Congress intended that federal employees have the same right to a plenary trial in federal court that all other employees have. Similarly, even if the Eighth Circuit in *Haire* v. *Callaway*, —— F.2d ——, 11 F.E.P. Cases 769 (8th Cir. 1975), were correct (which it is not) in concluding that the administrative remedy plus an independent determination by a federal court based on the administrative record is an "equivalent" remedy to a plenary trial in federal court, the decision still misses the point of *Alexander* and *Green*. Those cases are founded on the principle that Congress has deliberately provided concurrent, overlapping, and *independent* remedies for the elimination of discrimination in employment, see *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 47-48. Thus, even if one remedy, administrative or otherwise, were in fact equivalent to any other, this would not mean that the first was

prospective waiver of an employee's rights under Title VII" (415 U.S. at 51); certainly there is no knowing or meaningful waiver of a known right or privilege under the administrative scheme here.

either exclusive of or a limitation on the availability of an alternative.

Nevertheless, since the argument that the Civil Service Commission EEO procedures are an adequate remedy and therefore rights in federal court must be limited has been made, we believe it should be met. In the Brief proper, we will discuss the CSC procedures in terms of the analysis in *Alexander* v. *Gardner-Denver*, and will demonstrate that they suffer from the same deficiencies as do the arbitration procedures involved in that case. We have also prepared a detailed description and critique of the process that goes through it step-by-step, and this discussion is contained in Appendix A to this Brief. Both the Brief and the Appendix are based on a variety of sources in addition to the EEO regulations in 5 C.F.R. Part 713 themselves, since the regulations alone do not give either a full or an accurate picture of the EEO complaint process. The first part of Appendix A is an explanation of the sources and methodology used to arrive at the conclusions made here, and we refer the Court to pp. 1a-5a, *infra*. Throughout the Brief we will, with a few exceptions, refer to the Appendix, which cites to the original sources, rather than repeat those citations here.

B. *Summary and History of Part 713.*

Basically the process is divided into four parts, three of which involve the agency and the last the Appeals Review Board of the Civil Service Commission (CSC/ARB), *viz.*: (1) pre-complaint counseling; (2) the investigation; (3) the hearing and final agency decision; and (4) an optional appeal to CSC/ARB.

1. The regulations, and CSC/ARB decisions, require as an absolute precondition to filing a complaint of discrimina-

tion, that an employee first go through informal counseling (see, App. A, pp. 14a-15a). He must see a counselor within 30 days after the occurrence of the event he considers discriminatory. The counselor attempts to bring about a resolution of the problem without the necessity of a formal complaint. After 21 days, if no resolution has been reached, the employee is informed that he may file a formal complaint within 15 days.

2. Upon timely filing of the complaint, and if there are no other procedural bars to it in the opinion of the local EEO officer, an investigator is requested from the agency. The investigator prepares a report, a copy of which, along with a proposed resolution by the local agency head of the complaint, is given to the employee. The employee is informed that he may accept the proposed resolution, have the complaint decided by the national agency head on the basis of the investigative report, or have a hearing by a complaints examiner supplied by the Civil Service Commission. If he chooses the first option, the proposed resolution is put into formal written form and no further action is open to the employee. If he chooses the second or makes no choice at all, the agency issues its final decision and the employee may either appeal to CSC/ARB or file an action under Title VII.

3. If the third option is taken, a complaints examiner is provided by the regional office of the Commission. Following a hearing, the examiner makes a recommended decision to the agency head, which is not given to the complainant until after the final agency decision is rendered. The examiner's recommendation is not binding on the agency.

4. After the final agency decision, the employee may either appeal to CSC/ARB in 15 days or file a Title VII action in 30.

As the Court noted in *Morton* v. *Mancari*, 417 U.S. 535, 546-47 (1974), Congress passed § 2000e-16 and made Title VII applicable to federal employees largely because of dissatisfaction with the existing complaint resolution process set up by the Civil Service Commission. Among the criticisms were the complexity of the system, the delays in processing complaints, the control of the process and final decision-making by the agency-employer, and the focus of the system on identifying individual discriminators rather than on correcting systemic discrimination.

The system thus criticized had been instituted in 1969 by extensive revisions in the existing, largely informal, procedures for handling discrimination complaints. These changes, in Congress' view, were not adequate, and it expected that the system would be reformed as a result of the power provided the Commission in the 1972 Act. However, a comparison of the present CSC regulations dealing with investigation and hearing procedures, which became effective in late 1972, with those in effect during Congressional consideration of § 2000e-16, shows that no fundamental reform of the complaint process has been undertaken. Thus, those provisions of the regulations that are most important for the trial *de novo* issue, are unaltered except for some minor and non-substantive word changes. We call the Court's attention to pp. 57a-61a of Appendix B for a graphic demonstration that the procedure relied upon by the courts below in *Chandler, Salone,* and *Haire* is the same in all essential respects to that criticized by Congress in 1971 as "ineffective." *Morton* v. *Mancari,* 417 U.S. at 547.[15]

[15] None of the major changes in the regulations are directly relevant to the trial *de novo* issue. They include the addition of sections dealing with reprisals (§§ 713.261-713.263), "third-party" complaints (§ 713.251), notification of complainants of their right to sue under Title VII (§ 713.281), and the remedies and corrective action that are available (§ 713.271). Appendix B reproduces

C. The Administrative Process Is Not Equivalent To a Civil Action in Federal Court.

In *Alexander,* this Court discussed three general ways in which arbitration differed from a proceeding in federal court. They were, *first,* the role of the arbitrator and the non-Title VII orientation of the arbitration process; *second,* differences in the fact-finding process; and *third,* the exclusive control over the arbitration process by one of the interested parties. We urge that an examination of the EEO complaint process shows similar deficiencies rendering it also an "inappropriate forum for the final resolution of rights created by Title VII." 415 U.S. at 56.

1. *The Failure to Follow Title VII Law.*

In *Alexander,* the Court noted that discrimination claims required the resolution of statutory or constitutional issues and that this was "especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." 415 U.S. at 57. Particularly striking in the decisions of the Appeals Review Board and agencies, in investigative reports, recommended decisions of complaints examiners, and the various manuals and directives issued to guide those involved in the decision-making process, is the absence of references to the substantive law of Title VII, particularly as interpreted by the courts.[16]

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in its entirety FPM Letter No. 713-17, which shows all of the changes in the regulations instituted in 1972. This is the document referred to in *Hackley* v. *Roudebush,* 520 F.2d 108, 137, n. 117 (D.C. Cir. 1975).

[16] See, the guidebooks issued to counselors, investigators, and complaints examiners referred to in Appendix A, p. 2a. The Complaints Examiner's Handbook makes no reference whatsoever to any of the numerous court decisions dealing with burden of proof, *prima facie* case, etc. The Bureau of Intergovernmental

Indeed, with regard to at least one particularly crucial aspect of Title VII enforcement the regulations on their face are in direct conflict to established Title VII law. Thus, 5 C.F.R. § 713.271 requires that in order for a complainant to receive a retroactive promotion or back pay, the burden is on him not only to show that he was the victim of racial discrimination, but also that it is "clear" that "but for" the discrimination he would have been promoted, been appointed to the particular job in question, etc. This rule is directly contrary to Title VII law, since the courts have consistently held that once a plaintiff or affected class member has shown discrimination and that he has been denied a job, the burden shifts to the employer to demonstrate by clear and convincing evidence that in spite of the discrimination the employee would not have gotten the position and that therefore he is not entitled to a retroactive promotion or to back pay.[17] The rule similarly ignores this Court's

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Personnel Programs of the CSC does distribute to state and local government agencies a digest of EEO cases prepared in 1974 by the General Counsel's office (BIPP publication 152-46), and the General Counsel's office, since September 1972, has published periodically an abstract of court decisions "for the benefit of the members of the Interagency Advisory Group and other employees concerned with personnel programs and policies." General Counsel's Notes, Vol. 1, No. 1 (Sept. 1972), p. 1. There is no indication in any of the EEO decisions rendered, however, that any of the cases so digested are ever considered. Indeed, it is interesting to note that the first case cited in the former publication (*Hodgson* v. *First Federal Savings and Loan,* 455 F.2d 818 (5th Cir. 1972)), and a case cited in Vol. 1, No. 3 of the latter (*Cooper* v. *Allen,* 467 F.2d 836 (5th Cir. 1972)), are directly contrary to the CSC regulations governing what must be shown in order to obtain back pay. See, *infra.*

[17] See, *e.g., Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1379-80 (5th Cir. 1974); *Meadows* v. *Ford Motor Co.,* 510 F.2d 939, 941-48 (6th Cir. 1975) and the cases cited in n. 16, *supra.* In federal government cases the "but for" rule has been explicitly rejected as inconsistent with the law of Title VII. *Day* v. *Weinberger,* 8 E.P.D. ¶ 9771 (D.D.C. 1974); *Palmer* v. *Rogers,* 10 E.P.D. ¶ 10,265 (D.D.C. 1975).

holding in *McDonnell Douglas Corp.* v. *Green, supra,* that once the plaintiff had established certain basic elements showing discrimination, the burden then shifted to the employer to demonstrate that nevertheless there were valid reasons for not hiring the plaintiff. If the plaintiff in *McDonnell Douglas* had been a federal employee in the administrative process, he would not have made his case for getting a job and back pay if he had only proven the elements set out in that opinion, since he would not have affirmatively established that he would in fact have gotten the job in the absence of discrimination.

The failure to conform to Title VII law with regard to burden of proof is not accidental, particularly with regard to the making of a *prima facie* case by statistical evidence. In a decision rendered in April 1973, CSC/ARB in fact applied proper standards of Title VII law in what was to become a pivotal case in Civil Service Commission EEO enforcement.[18] The Appeals Board noted the showing of a failure generally to promote any Jewish employees above a certain GS level despite their evident qualifications and of the failure to promote the complainants individually. It held that the complainants had established a *prima facie* case of discrimination which the agency had failed to rebut by showing a "nonreligious merit basis" for the failure to promote. Therefore it ordered that appropriate corrective action be taken. The Civil Service Commission reopened the case under § 713.235 and vacated the decision of CSC/ARB, deciding, in effect, that the complainants had not met their burden of proof of establishing not only that there was discrimination, but that they would have gotten some particular job if there had been none. The Commission did *not* find that the agency had shown the negative.

[18] CSC/ARB Decision No. 713-73-465.

(Minutes of U.S. Civil Service Commission, Nov. 14, 1973, p. 324) The result of this decision, which under the regulations has binding precedential affect on both agencies and CSC/ARB, is that ARB since has rarely attempted to rely on statistical evidence to establish a *prima facie* case.[19]

Another deviation from Title VII law is embodied in the handbook used by Complaints Examiners in deciding whether the evidence supports a finding of discrimination. As pointed out in *Hackley* v. *Roudebush,* 520 F.2d 108; 138, n. 129; 171, n. 3 (Leventhal, J., concurring), the examiner is essentially instructed to find discrimination only in those cases where there is no reasonable doubt to the contrary. Thus, the burden on the complainant is significantly more onerous than in a Title VII proceeding under the rule of *McDonnell Douglas Corp.* v. *Green, supra.*

Other examples of failures to follow Title VII law are legion, and include the refusal to recognize the concept of a continuing violation,[20] the refusal to consider systemic or class violations in any meaningful way, and the severe limitations on the kinds of relief available in the administrative process. Despite the repeated description of Title VII as a remedial statute which to be effective must be

[19] The order of the commission reopening and reversing the ARB was dated November 14, 1973. Our study of CSC/ARB decisions (see, App. A, pp. 3a-4a) reveals that prior to December 31, 1973, ARB considered allegations that there was discrimination against the complainant's class generally in 85% of the cases where such an allegation was made (40 out of 47). In 10 of those cases, discrimination was found against the group. After December 31, 1973, on the other hand, such evidence was considered in only 6 of the 20 cases (30%) in which an allegation of general discrimination was made. In 6 other cases (as compared to 1 pre-December 31 case) general allegations of discrimination were considered as only "background information," but not as probative evidence that the individual complainant had been discriminated against.

[20] See, App. A, pp. 12a.

broadly construed,[21] the Civil Service Commission persists in so limiting the kinds of relief obtainable as to render the statute ineffective. We have already noted the "but for" rule, the results of which are that hardly any federal employees have gotten either back pay or retroactive promotions.[22] The standard relief given, if any, is "training" which may lead to a promotion, or at best, priority consideration for the next promotion. CSC/ARB has flatly held that it is powerless, because of the "but for" rule, to grant the kind of systemic class-wide relief that is standard in private Title VII actions.[23]

Thus, just as this Court pointed out in *Alexander* that the specialized competence of arbitrators lay in the meaning of collective bargaining agreements (415 U.S. at 56-57), so the expertise of those officials involved in the processing of EEO complaints relates primarily to the intricacies of federal personnel policy, rather than the substantive law of Title VII.[24] The complaints examiner, for example, has as a primary function the adjudication of such matters as adverse actions against federal employees, reductions in force, etc., rather than racial discrimination. The typical decision at both the agency level and CSC/ARB, limits its inquiry to attempting to find direct evidence of overt discrimination by a particular supervisor.[25] In contrast, where such direct

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[21] See, *e.g.*, *Albemarle Paper Company* v. *Moody*, —— U.S. —— 45 L.Ed.2d 280 (1975).

[22] See, App. A, p. 34a.

[23] See, App. A, p. 35a.

[24] A reading of the decisions demonstrates that the orientation of the persons making them is that of personnel officers, rather than persons experienced in adjudicating racial discrimination complaints. See, *e.g.*, App. A, 22a, n. 24; 38a, n. 56.

[25] This limitation of the inquiry to an attempt to find specific overt acts of racial discrimination is in and of itself contrary to

evidence is not adduced but rather evidence typical of Title VII cases is, namely, evidence relating to the lack of advancement of blacks, women, or other minority groups in general, the decisions then proceed to explanations of why in the particular case the non-selection of the complainant was justified under personnel practices.

2. *Deficiencies in the Fact-Finding Process.*

Hackley v. *Roudebush, supra,* noted that the administrative process available to federal employees "falls short of a Title VII action in certain of the crucial respects stressed in *Alexander* v. *Gardner-Denver*" relating to fact-finding (520 F.2d at 171 (Leventhal, *J.*, concurring)). At no point in the process does a complainant have available to him anything equivalent to discovery. He can request the investigator to make certain inquiries, but the investigator is under no compulsion to do so.[26] At the hearing stage, if the complainant seeks to have information furnished him prior to the hearing so that adequate preparation can be made, whether the request be in the form of interrogatories, the production of documents, or the interviewing of witnesses, he is told that the complaints examiner has no power to require the agency to furnish such information and whether or not it will is wholly within the agency's discretion.[27] The effect of these limitations is to put the complainant at a severe disadvantage since, as the courts have often recognized, in an employment discrimination case the evidence uniquely tends to be in the hands of the

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prevailing Title VII law. See, *e.g.*, *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972), and was cited by Congress in 1971 as a major deficiency in the CSC process. See, H. Rep. No. 92-238, on H. R. 1746, 92d Cong. 1st Sess., at 24 (1971).

[26] See, App. A, pp. 25a-26a.

[27] *Id.*, at 36a; App. C, p. 90a.

defendant, and the plaintiff must have access to it *before* trial. See, *e.g., Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 342-43 (10th Cir. 1975). Indeed, the complaints examiner has no subpoena power at all. He can request that employees of federal agencies be produced at the hearing, but if, as for example was the case in *Hackley* (520 F.2d at 114, n. 15), an important witness is no longer employed and does not appear voluntarily, there is simply no way to obtain his testimony.

The process itself is specifically stated to be non-adversarial; it does not purport to be like a hearing in court, but is defined as an adjunct to the investigation.[28] The consequences for the complainant are severe. Although there is said to be no burden of proof, if the complainant does not, for example, prove and make the record "clear" that he would have gotten a job "but for" discrimination, he will find out from the agency head or CSC/ARB, after it is too late to do anything about it, that he has not established his right to get any effective relief.[29]

There is no provision whatsoever in the regulations for furnishing a complainant with an attorney. The complainant is entitled to have a representative, but if he cannot afford to hire his own lawyer, the only thing he can do is to attempt to get an attorney who works for the same agency to represent him. An attorney employed by the government but working for another agency is unlikely to do so because under the regulations he is not entitled to administrative leave, but must use up annual leave or take an unpaid leave of absence.[30] On the other hand, the agency

[28] *Hackley* v. *Roudebush*, 520 F.2d 138, n. 129, 171. App. A, pp. 29a-30a.

[29] See, App. A, p. 30a, n. 40.

[30] See, App. A, pp. 28a-29a.

is generally represented by an attorney at the hearing, particularly in the case of military departments which are able to rely on staff judge advocates to appear for them.[31] Thus, in many instances, a complainant must either attempt to present his own case or rely on a lay advocate to assist him. Given the complexities of proving a discrimination claim and the difficulties in marshalling proof, it is not surprising that the records developed in such proceedings are often inadequate to establish even a *prima facie* case of discrimination.

Finally, the limitations on consideration of statistical data and evidence of general practices with regard to minorities make the fact-finding process wholly inadequate. Complaints examiners refuse to allow the admission of such evidence on the ground that it cannot be relevant to individual claims of discrimination, and class claims cannot be raised in an individual complaint proceeding. These restrictive rulings are consistently affirmed by CSC/ARB[32] in disregard of this Court's holding in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 804-805, and numerous decisions by lower federal courts (see, *e.g., Burns* v. *Thiokol Co.*, 483 F.2d 300 (5th Cir. 1973), and cases there cited, and *Rich* v. *Martin Marrietta Corp.*, 522 F.2d 333 (10th Cir. 1975)).

3. *The Exclusive Control By the Agency of the Process.*

In *Alexander*, the Court noted that one problem with deferring to an arbitration proceeding was that the process was under the control of the union, which often might be an interested party (415 U.S. at 58, n. 19). The situation is the same with regard to the adjudication of EEO com-

[31] See, *e.g.*, the case discussed in App. A, p. 29a, n. 39.

[32] See, App., pp. 30a-31a.

plaints. At every stage in the agency proceeding the entire process is under the control of the agency, the ultimate defendant in a Title VII case. The EEO counselor is an employee of the local office of the agency; the EEO officer is also and indeed is often connected with the division whose head also supervises the personnel office. The investigator is an employee of the agency, whose role is only to recommend a resolution that is acceptable to the local agency head. He is dependent on the local agency personnel for obtaining information, since he has no subpoena power.

At the next step, a complaints examiner is provided by the Civil Service Commission. However, he does not function independently from the agency in the way that an administrative law judge does. He has no power to require the agency to provide information prior to the hearing, and even at the hearing itself he does not have available compulsory process. He does not himself make the decision, but only forwards a recommended decision to the head of the agency, the person who will ultimately be the named defendant in any action brought under Title VII. A complainant has no right to see the recommended decision or the transcript of the hearing before the final decision is made.

The agency head need not adopt the recommended decision of the complaints examiner, and not surprisingly a decision finding no discrimination is almost always adopted, whereas decisions recommending a finding of discrimination are not followed in about 25% of the cases.[33] Although the regulations purport to require the agency head to give his reasons why he does not adopt the recommended decision of the complaints examiner, this provision is not effectively enforced.[34]

[33] See, the statistics cited in App. A, p. 32a, n. 44.

[34] See, App., pp. 31a-32a, n. 43.

At this point, the complainant can go into federal court; thus, the fact that an appeal to CSC/ARB can be taken is irrelevant as far as the trial *de novo* issue is concerned (see, *Hackley* v. *Roudebush*, 520 F.2d at 154-155). In any event, ARB does nothing but review the record made at the agency level and affirms findings of no discrimination in more than 96% of the cases.[35]

4. *Other Variations from Court Proceedings.*

In addition to the deficiencies similar to those in the arbitration process discussed in *Alexander*, the EEO complaint process is different from a court proceeding in other important respects. As discussed at some length in Appendix A (pp. 6a-9a; 12a-13a; 18a-22a), a complainant is faced with a variety of technical and rigorously enforced procedural hurdles before he can get a decison on the merits. Thus, he must pick one of a variety of alternative procedures without full information as to the consequences of selecting one as opposed to another; he may, thereby, inadvertently waive important rights. (App. A, 23a-24a). He must meet *two* limitations periods before a complaint can be filed (*Id.*, 18a). If the complaint fails to meet the various deadlines imposed on him, the proceeding is either terminated or restricted in scope. On the other hand, if the agency fails to act within specified time periods there are, with one exception,[36] no similar consequences. In short,

[35] See, Brief for Respondents in *Brown* v. *G.S.A.*, No. 74-768, App. C, p. 53a. See, App. A, p. 33a, nn. 46 and 48. According to statistics compiled by the CSC, in FY 1973 and 1974 combined, agencies rendered 2250 decisions *on the merits* in EEO cases. There were final agency decisions finding discrimination in 308 or, 13.7%.

[36] Section 713.220 provides that *if* the complaints examiner recommends a finding for the complainant and *if* the agency does not issue its decision within 30 days after submission of the recommended decision, and *if* a final agency decision has not been

there are no such devices as a default judgment or other enforceable sanctions against a dilatory defendant as exist in the Federal Rules. Finally, not only are the rules under which EEO complaints decided not in conformity with Title VII law, but they are secret. Decisions of CSC/ARB are virtually unobtainable; the fact that the Commission has reopened cases under § 713.235 is unknown (counsel for *amicus* learned of them literally by accident), and the documents explaining them are difficult to obtain.

In sum, a complainant is cast adrift in a system of unnecessary complexity, that operates according to rules that can not be readily determined, in which the power over what evidence is to be considered is in the hands of the defendant, and in which that same defendant is the judge. However this process might be characterized, it is clearly not equivalent to an action in federal court.

CONCLUSION

The proper resolution of the issue in this case depends upon a recognition of the relationship between the substantive rights guaranteed by Title VII, and the procedures available in federal courts to enforce them. The rules established by decisions of this Court, relating to such procedural questions as burden of proof,[37] trial *de novo*,[38] class

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rendered within 180 days after the date the complaint was filed, then the recommended decision becomes the final agency decision and cannot be rejected. The instances of this occurring are relatively rare, particularly since complaints examiners recommend for the complainant in only a small percentage of the cases.

[37] *McDonnell Douglas Corp.* v. *Green, supra.*

[38] *Alexander* v. *Gardner-Denver Co., supra.*

actions and equitable discretion,[39] the right to counsel fees,[40] and the existence of alternative remedies,[41] as well as the extensive body of law developed by the lower federal courts on these and other issues such as the right to broad discovery[42] and the scope of class actions[43] are all founded upon this relationship. Title VII is a remedial statute, intended by Congress to correct one of the great ills of our society. Its broad pronouncements as to rights cannot be made realities unless the procedures available to the courts are correspondingly broad and effective. This Court has already held, in *Morton* v. *Mancari,* 417 U.S. 535, 546-47 (1974), that the purpose of the 1972 amendments embodied in 42 U.S.C. § 2000e-16 was to make the substantive law of Title VII applicable to the federal government. This purpose can be realized if, and only if, the procedural law of private Title VII law is also fully applicable.

For the foregoing reasons, the decision of the court below should be reversed.

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[39] *Albemarle Paper Co.* v. *Moody, supra.*

[40] *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968).

[41] *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975).

[42] See, *e.g., Burns* v. *Thiokol Corp.,* 483 F.2d 300 (5th Cir. 1973).

[43] See, *e.g., Johnson* v. *Georgia Highway Express, Inc.,* 417 F.2d 1122 (5th Cir. 1969).

APPENDIX A

Explanation and Critique of the EEO Complaint Process

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Explanation and Critique of the EEO Complaint Process

A. *Introductory Note: Sources and Methodology*

The discussion in the Brief and the following analysis of the administrative complaint system begins with the regulations themselves, including not only Part 713, but other Parts of Title 5 of the Code of Federal Regulations, and with those sections and publications in the Federal Personnel Manual (FPM) interpreting them. As the Court will note, however, the regulations and the FPM, deal with procedures, and virtually the only substantive rule is in 5 C.F.R. ¶ 713.271 relating to when an award of back pay or a retroactive promotion may be given. The interpretations of the regulations are found in a variety of manuals and other explanatory material sent out by the Civil Service Commission.[1] These include, *Equal Employment Opportunity Counseling, a Guide Book* (Personnel Methods, Series No. 19, 1973); *Investigating Complaints of Discrimination in Federal Employment* (Personnel Methods, Series No. 17,

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[1] In a letter dated October 24, 1974, the Acting Chief of the Discrimination Complaints and Enforcement Section, United States Civil Service Commission, informed amicus that the following materials are those relied upon by the Section "in providing assistance to complainants and agencies in the processing of EEO complaints." (1) FPM Letter No. 713-17 (reproduced as Appendix B); (2) FPM Letter No. 713-21; (3) FPM Letter No. 713-28; (4) FPM Letter No. 713-20; (5) Letter of Chairman Robert Hampton to Arthur Sampson, head of the General Services Administration, dated June 18, 1973; (6) FPM Bulletin No. 713-34; (7) FPM Bulletin No. 713-35; (8) Personnel Methods Series No. 18 (dealing with Adverse Action Appeals); (9) Appendix B-6, FPM Chapter 713; (10) Personnel Methods Series No. 17 (on file with the Clerk of Court). Letter from Walter J. Dent to Phyllis McClure (reproduced in Appendix C, *infra*, p. 81a).

1971); *Discrimination Complaints Examiner's Handbook* (1973); and a letter memorandum dated January 27, 1975, from Irving Kator, Assistant Executive Director of the CSC, to agency Directors of Equal Employment Opportunity and Directors of Personnel explaining the relationship between individual EEO complaints and so-called "Third-Party" allegations (or complaints) of discrimination.

As this Appendix was being written, *amicus* learned that the CSC had recently issued a revised Counselor's Guidebook (October, 1975) and a revised Investigator's Guidebook (March, 1975). We have reviewed both, and believe that no substantive changes have been made in either. The new investigator's guidebook in particular mainly rearranges existing sections. The discussions in each as to the scope of the investigation—the key provisions—are essentially the same. *Compare,* pp. 8-12 and 15-17 of the old guidebook with pp. 21-26 and 29-32 of the new. The draft of the new investigator's guidebook was analyzed by the Civil Rights Commission in its recent report, and found to be largely unchanged. See, *The Federal Civil Rights Enforcement Effort—1974, Vol. V. To Eliminate Employment Discrimination* (July, 1975), at pp. 71-75. We have also obtained a copy of a draft of a new Complaints Examiner's Handbook that is being prepared. It too does not seem to contain any substantive changes; in particular, the hearing is still described as non-adversarial and there is no right to pre-hearing discovery. We have lodged with the Clerk of the Court copies of the four guidebooks and the two versions of the Complaints Examiner's Handbook for the convenience of the Court. They will be cited as follows: "Counselor's Guidebook;" "Revised Counselor's Guidebook;" "Investigator's Guidebook;" "Revised Investigators Guidebook;" "Handbook;" and "Revised Handbook."

In individual cases that are appealed to the Civil Service Commission decisions are rendered by the Appeals Review Board (formerly the Board of Appeals and Review), referred to here as CSC/ARB, that are based on the regulations and various interpretations of them. However, under the regulations CSC/ARB decisions have no precedential value, they do not interpret or apply Title VII law as developed by the courts, and are essentially *ad hoc* decisions. 5 C.F.R. § 713.235 permits the complainant, the agency (or the Commission) to request that the Commissioners themselves re-open and reconsider any ARB decision. Under § 713.235, Commission decisions have precedential value and govern subsequent interpretations of the regulations by ARB and the agencies.

In December, 1974, *amicus* obtained from a regional CSC office a set of all the decisions of the Appeals Review Board from September 6, 1972 to July 1, 1974, more than 1,000 decisions. After Fiscal Year 1974, all CSC/ARB decisions were no longer made available to regional offices. However, since 1973, CSC/ARB has published on a monthly basis a "Digest of Significant Decisions," including EEO decisions under Part 713, to which *amicus* subscribes. In addition, since July 1, 1974, we have obtained a number of CSC/ARB decisions dealing with such important questions as burden of proof, class actions, continuing violation, etc.

Early this year, *amicus* learned that the Civil Service Commission had, on eight occasions involving a total of thirteen complainants, considered requests that CSC/ARB decisions be reopened under § 713.235. Six cases, involving nine individuals, were reopened. Three dealt with procedural questions and three with the merits. *Amicus* obtained copies of the minutes of these actions, which consist of a

very brief summary of what had been done. Upon making a request under the Freedom of Information Act, we learned that the Commission did not issue or publish opinions as such; however, we were supplied with material, in the form of letters to either the agency or the complainant, that did give reasons for the action.

The decisions of CSC/ARB were analyzed as follows. Staff counsel for *amicus* surveyed the decisions and prepared analytical index sheets. A group of senior law students from Columbia University reviewed all the decisions and indexed them. A number of topic areas were then designated, and the students read all decisions relating to each, and prepared papers analyzing the decisions. Counsel reviewed the papers, cross-checked the CSC/ARB decisions for accuracy, and analyzed further in light of the Digest of Significant Decisions and the Commission reopenings. In this way, we were able to ascertain the various rules under which the decisions were rendered.

In addition to the above materials, we have also had access to investigative reports and EEO hearing transcripts in particular cases. Finally, counsel for *amicus* have themselves represented complainants in EEO investigations and hearings. The analysis that follows is based on a synthesis of our research into and experience with the EEO complaint process.

CSC/ARB decisions are cited in three ways: (1) decisions rendered up to June 31, 1974 were indexed under Part 713 and numbered in chronological order, e.g., 713-73-593, and will be cited here in the form "ARB, 713-73-593"; (2) decisions *after* June 31, 1974, that *amicus* has do not have index numbers on them, and will be cited by date and complainant's name (*e.g.*, ARB, Oct. 21, 1974

(*In re Smith*)); (3) decisions in the Digest of Significant Decisions are given digest numbers in the form, RBO 71360025, and will be so cited with a reference to the volume and page of the Digest, thus, "RBO71360025, Digest 2, p. 12." We have included in Appendix C a complete ARB decision (at pp. 82a-85a), as an example Citation to decisions on reopenings by the Commission itself will be to the date of the Commission minutes and to a description of the explanatory material obtained. All of the materials referred to or used in the following analysis can be obtained from the Washington office of the Commission.

A similar analysis of the complaint system is contained in a recent report of the United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974, Vol. V, To Eliminate Employment Discrimination* (July, 1975) [hereinafter, "CRC Report"] at pp. 61-86, 619-23 and 656-58. These excerpts have been reproduced as an Appendix to the Brief for Petitioner in *Brown* v. *General Services Administration,* No. 74-768. The Civil Rights Commission report not only describes and draws conclusions about the process, but recommends that, "The Commission should issue completely revised complaint procedures which provide Federal employees charging discrimination a full and fair proceeding consistent with Title VII standards." *Id.* at 656. The complaint procedures were also analyzed earlier in a report prepared by Ralph Nader's Public Interest Research Group, M.W. Brewer, Jr., *Behind the Promises: Equal Employment Opportunity in the Federal Government* (June, 1972). This study has recently been edited and incorporated in R. G. Vaughn, *The Spoiled System, A Call for Civil Service Reform* (1975).

B. *The Regulatory Scheme*

The CSC system for processing EEO complaints can best be analogized to common law pleading in its complexity and opportunities for missteps. The first difficulty arises in choosing which of many routes one should pursue, since in addition to the regular complaint procedure under 5 C.F.R. §§ 713.211-713.236, 713.271, and 713.281-713.283, there are a variety of other procedures under which complaints raising discrimination related claims may be pursued. These include:

(1) Charges of reprisal because of filing of a complaint of discrimination (5 C.F.R. §713.261-.263);

(2) "Third-party complaints" (5 C.F.R. § 713.251);

(3) Complaints of racial discrimination as a defense to an adverse action (*e.g.*, suspension, dismissal, withholding of wage increase, etc.) (5 C.F.R. § 772.306);

(4) Appeals from termination at the end of a probationary period (5 C.F.R. Part 315);

(5) Challenges to C.S.C. required job requirements (e.g., tests or educational qualifications) (5 C.F.R. § 300.103-300.104);

(6) Appeals from a Reduction in Force Action (5 C.F.R. Part 351);

(7) Grievances (5 C.F.R. Part 771);

(8) Appeals from assignment of grade (5 C.F.R. Part 511).

Some of these procedures will be discussed, *infra*, in greater detail. The point to be made here is that, for example, an employee who is faced with an adverse action or a probationary employee who is terminated before he has acquired tenure, and who wishes to charge discrimination must elect to proceed either under Part 713 or under Part 772 (adverse action) or Part 315 (probationary employee). He is informed of the different internal procedures that will be followed, *e.g.*, under Parts 772 and 315 the initial decision is made by the Federal Employees Appeals Agency at the regional CSC office, rather than by the agency itself. He is not informed, however, that if the adverse action is reversed on a procedural ground, then the underlying discrimination claim will never be reached.[2]

[2] The complexities of the system can be illustrated by a case counsel for *amicus* handled. Complainant filed an EEO complaint under Part 713 in July of 1973. In September, on the day an investigator arrived, complainant was informed that his discharge from the service was being proposed under adverse action procedures. The local EEO officer then cancelled the EEO complaint on the ground that the discrimination claim could be raised in the adverse action proceeding. Complainant filed both a complaint and a charge of reprisal under § 713.261 (see, *infra*, p. 36a), and, as a result, the discrimination complaint was reinstated. However, when the complainant was discharged, the agency took the position that the discrimination complaint merged into the adverse action appeal. Complainant protested that the regulations did not so provide and that he was entitled to have the discrimination and reprisal complaints processed expeditiously and independently of the appeal. The CSC refused to so order and informed him that the discrimination and reprisal charges would be considered as part of his appeal. However, his discharge was reversed on a procedural ground (in July 1974, the following year) and the discrimination claim was never reached. He then requested the CSC to require the processing of the EEO claim, now a year old (the regulations require that it be disposed of in 180 days), but got no reply. In the meantime, the agency appealed the decision ordering his reinstatement to CSC/ARB, thereby automatically staying his return to work. CSC/ARB affirmed and he returned to his job in December, 1974. He filed an action under Title VII at the same time, since his underlying complaint of racial discrimination had never been resolved. Subsequently, the United States moved to remand

He is also not informed that if he chooses any avenue other than Part 713, he will not, at its end, be informed that he has a right to sue under Title VII. See, *infra*, pp. 37a-38a.

Moreover, because of the short and strictly enforced time requirements for filing under the various provisions, if a complainant chooses the wrong avenue, by the time he discovers his error it will be too late to file under the proper one. This problem arises particularly when an employee seeks to challenge a CSC job qualification by proceeding under Part 713. He will discover that such a challenge is "not within the purview" of that Part, since it covers only *agency* actions, too late to file under Part 300, the only means for challenging CSC actions[3] (see *infra*, pp. 38a-40a).

The administration of Part 713 itself suffers from a similar rigid application of technical rules, the result of which is either to eliminate a substantial number of complaints without ever reaching the merits, or to severely restrict the scope of inquiry. The narrowing of the process begins with the complaint form which requires that a particular person be named as the discriminator and one specific act be designated. The focus of the inquiry is still based on the assumption "that employment discrimination is primarily a matter of malicious intent on the part of individuals," precisely the defect noted by the House Re-

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the case to the agency for further processing of the administrative complaint (see Brief, *supra*). As part of that request, the agency ordered, in April 1975, that the investigation of the EEO complaint be resumed. The District Court denied the motion to remand, noting the passage of 780 days since the complaint was filed without final action. See, *McHoney* v. *Callaway*, E.D.N.Y., C.A. 74-C-1729 (Oct. 10, 1975).

[3] Unless the CSC is the employing agency, in which case Part 713 must be used. See n. 26, *infra*.

port cited in *Morton* v. *Cancari*, 417 U.S. 535, 547 (1974).[4] Thus, the common outcome of the process is that charges against an individual are explained away by reference to personnel policies or other reasons that do not deal with systemic types of discrimination.[5]

The process that a Federal employee must follow may be contrasted with that under the Equal Employment Opportunity Commission, used by all other employees. The EEOC investigation is deliberately broad and wide ranging. It seeks to uncover and correct systemic problems and to afford effective relief not only to the individual complainant, but to all affected persons. See, EEOC Compliance Manual, Investigations, ¶¶761-905, CCH Employment Practices Guide. See also, *Graniteville Co.* v. *EEOC*, 438 F.2d 32 (4th Cir. 1971). The results obtained by EEOC are similarly broad and effective, despite its lack of plenary administrative enforcement power such as the CSC has; thus, in Fiscal Years 1974 and 1975, the EEOC obtained more than 160 *million* dollars in back pay for 100 *thousand* employees. See, text at n. 50, *infra*. Indeed, Congress expceted that the CSC consult with the EEOC because of its knowledge and experience, and develop its EEO programs

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[4] H.R. Rep. No. 92-238, on H.R. 1746, 92d Cong., 1st. Sess., 23-25 (1971); see also S. Rep. No. 92-415, on S. 2515, 92d Cong., 1st. Sess., 14 (1971).

[5] For example, in the case reproduced in App. C, pp. 82a-85a, *In re Jones*, although systemic discrimination was found that adversely affected the complainant, it was laid to the *former* supervisor. Since the present selecting official was not himself shown, to ARB's satisfaction, to have discriminated personally, neither a retroactive promotion nor back pay was awarded. In another case, ARB, May 6, 1975 *(In re Williams)*, ARB noted that the agency (the Tennessee Valley Authority) had never hired a black into the particular job in question, but denied relief to the complainant by accepting without question the agency's explanation why he was not hired. See also C.R.C. Report, p. 66, n. 219.

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along similar lines. S. Rep. No. 92-415, on S. 2515, 92d Cong., 1st Sess., p. 16 (1971).

C. *Part 713 Procedures*

A flow chart of the complaint process under Part 713 follows. It should be noted that the process is potentially more complex than the chart indicates, since a complaint may be rejected or cancelled at certain points for failure to prosecute (see, 5 C.F.R. § 713.220(b)). Thus, for example, if a complainant does not show up for a meeting with the investigator (see chart, 4.c.), the complaint may be cancelled.

(See Opposite) ☞

FLOW CHART: EEO COMPLAINT PROCESS - 5 C.F.R. Chapter 713

(Key: the times to the left are mandatory time periods; the time periods to the right in parentheses indicate time periods in which the agency is supposed to do something)

1**ACT OF DISCRIMINATION
30 DAYS
2**FIRST INTERVIEW WITH EEO COUNSELOR: NOTICE OF RIGHT TO FILE FORMAL COMPLAINT
(21 days)
3**FINAL INTERVIEW W/COUNSELLOR: [b. COMPLAINT REJECTED [for procedural reasons]
15 DAYS
4**WRITTEN COMPLAINT FILED - - -

Appendix A

1. Act of Discrimination (713.213(a); 713.214(a)(1)(i))

The civil service regulations do not recognize the concept of a continuing violation.[7] Thus, something must have happened to the complainant within the thirty-day period before he goes to see an EEO counsellor. (The thirty days runs either from the date of a discriminatory act or from the effective date of a personnel action, if that action is claimed to be discriminatory). Although events occurring *prior* to the 30-day period can be used as "background material," relief can be given only as to events within the period, no matter what the relationship of the earlier events to the occurrence considered to be timely.[8]

[7] CSC/ARB has flatly held that, "there is no provision [in the regulations] whatsoever for accepting non-specific complaints of 'continuing' discrimination." (ARB October 15, 1974, *(In re Conner)*). We think this position is wrong, since it conflicts with a number of decisions upholding the concept. *Cox* v. *United States Gypsum*, 409 F.2d 289 (7th Cir. 1969); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971). See also, CRC Report at p. 65, n. 218, and *Ettinger* v. *Johnson*, 518 F.2d 648 (3rd Cir. 1975).

It should be noted that § 713.213 as it was in effect from 1966-69 (see, 31 Fed. Reg. 3069, 32 Fed. Reg. 15631), *did* contain a provision that, "A complaint concerned with a continuing discriminatory practice having a material bearing on employment may be filed at any time." This provision was subsequently deleted.

[8] ARB May 6, 1975 *(In re Williams)*. In *Williams*, a black challenged his failure to be hired as a heavy equipment operator by the Tennessee Valley Authority (no black had ever been hired for the job). The reason given for his not being hired was his lack of training as a crane operator. Complainant also alleged, however, that blacks had generally been excluded from the apprenticeship program that gave the training alleged to be necessary. These facts were considered only as they indicated a "possible pattern of discrimination directed against the complainant individually which might have a direct bearing on the matter forming a proper basis for a complaint." However, no relief could be afforded for such past actions. See also, CRC Report, at p. 65.

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The thirty-day rule has been strictly construed by CSC/ARB. Thus, although § 713.214(a)(4) provides that:

> The agency shall extend the time limits in this section (i) when the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency. . . .

In fact, few reasons for failing to comply are accepted.[9]

It should be noted that the 30-day rule is purely administrative. Title VII does not specify a time limit for filing a charge against the federal government as it does for filing a charge with the EEOC. Thus, the rigidity with which the rule is imposed seems particularly unjustified,

[9] In 1972-1974, CSC/ARB decided 90 appeals involving timeliness of initial contact with the counselor. There were 73 affirmances of agency findings of untimeliness, 5 remands for further fact-finding as to the reasons for untimeliness, and only 12 decisions accepting reasons given by complainants. These mostly involved cases where complainants had proven they were misinformed by agency personnel.

BAR has rejected explanations that military obligations prevented contacting a counselor for three months (No. 713-73-368); that the employee had been assured by his union that it would handle the matter (No. 713-73-417); that management had said the matter would be handled "informally" (No. 713-74-508); even where the complainant was on authorized sick leave with severe illnesses the case was only remanded to determine whether he could have contacted a counselor nevertheless (No. 713-73-433). See also, No. 713-74-374, discussed *infra* at n. 12, where the fact that the employee was in jail for two months was not a sufficient excuse. The fact that a complainant started out in one of the other CSC procedures available does *not* toll the period for going to a counselor. See, *e.g.*, Nos. 713-74-66; 713-73-527; 713-74-399 (following grievance procedures does not excuse failure to go to an EEO counselor).

especially in view of the refusal of the CSC to recognize no longer the concept of a continuing violation.

2. Interview With Counselor (713.213(a))

Although § 2000e-16 itself speaks only of the filing of an "initial charge", the CSC regulations provide that a complainant first must go to an EEO counselor and attempt informal resolution before he can file a "formal" complaint of discrimination. The counseling process is an absolute prerequisite to filing a complaint. Moreover, the fact that a complaint was sought to be filed within the time period will not cure a failure to follow the counseling process.

One effect of the counseling requirement is to extend the 180-day period in the statute to 201 days, since the regulations require that at least 21 days be spent in counseling. Thus, the counseling requirement is arguably in conflict with § 2000e-16, since one of Congress' main concerns was delays in the process.

Counselors are not full-time EEO people, but are assigned to act as counselors part-time away from their regular jobs. The counselor's role is to attempt an informal settlement of the problem within 21 days; indeed, more than ⅓ of all complaints filed government-wide were so disposed of.

No firm data is available as to the kinds of "corrective action" taken as a result of counseling.[10] Nevertheless, it

[10] EEO offices fill out monthly reports on counseling that set out the following categories of corrective action: (1) "agency improved personnel practices"; (2) "promotion received"; (3) "training opportunity received"; (4) "reappointment/reinstatement"; (5) "requested reassignment received"; (6) "Adverse Action reduced or rescinded"; (7) "other disciplinary action reduced or rescinded"; (8) "Priority consideration for next promotion"; (9) "Other."

is clear that such action is most often of a limited nature. For example, it is impossible for counselors to get anyone either a retroactive promotion or back pay since the regulations make a finding of discrimination a precondition for both (713.271), and counselors have no power to make such a finding. Congress was critical of the whole concept of informal resolution of complaints since it "denied employees adequate opportunity for impartial investigation and resolution of complaints." H.R. Rep. No. 92-238 on H.R. 1746, 92d Cong. 1st Sess., at 23 (1971). S. Rep. No. 92-415 on S.2515, 92d Cong., 1st Sess., at 14 (1971).

Under the system as administered, only about 10% of the persons who go to see a counselor file a complaint. About 35% more receive some sort of "corrective action" as a result of counseling. The other 55% neither file nor get any relief. (See, Brief for Respondents in *Brown* v. *G.S.A.*, No. 74-768, at pp. 48-49). While there is no firm data as to what happens to that 55%, it is notable that the EEO counselor's guidebook, at p. 1, notes with pride the fact that only one out of ten persons file a complaint. Thus, while the regulations state that counselors are not supposed to prevent persons from filing (§ 713.213), counselors are certainly not led to encourage people to do so. Again, EEOC practice may be contrasted; there, the first thing that is done is the filling out and filing of a written complaint, *after* which investigation and conciliation is pursued.

3. Notice of Right to File (713.213(a))

At the end of 21 days, if there has been no disposition agreed upon by both the complainant and the agency, the counselor is to give the complainant a letter notifying him of his right to file a discrimination complaint within 15

days after a final interview with the counselor. (The failure to give such notice carries no sanction against the agency.)

4. Filing of the Complaint (713.214)

Within 15 days the formal written complaint must be filed with the EEO officer, or other designated official,[11] or it will be rejected as untimely.[12] CSC considers that the 180-day period at the end of which a civil action may be filed in court runs from the date of filing of the administrative EEO complaint, and some agencies take the position that the complaint is not "filed" until the EEO officer sends a letter of formal receipt. Thus, the date of receipt is not necessarily determinative. In some instances, EEO officers neither formally accept or reject a complaint on the grounds attempts are being made to resolve it "informally." Like the counseling requirement, these filing procedures have the effect of further extending the 180-day provision of § 2000e-16 in which a civil action may be filed.

The letter from the EEO counselor may note that it is preferable that the complaint be on the standard agency form.[13] The form requires that an "alleged discriminatory

[11] The regulations specify that the complaint may also be filed with the agency director of EEO; in every instance, the complaint is sent to the local EEO officer for processing.

[12] Section 713.214(a)(3) provides that it is timely if postmarked within the 15-day period as long *as it is addressed to one of the officials designated by the agency*. This requirement is also strictly construed. Thus, a complainant mailed a complaint well within the 15 days, but addressed it to the "Equal Employment Opportunity Office, Washington, D. C." The letter was delivered to the EEOC, which re-routed it to the agency EEO office, but not until 34 days had passed. ARB affirmed the agency's rejection of the complaint as untimely (ARB, No. 713-74-574). This result was later rejected as a defense to a Title VII action. *Hunt* v. *Schlesinger*, 389 F. Supp. 725 (W.D. Tenn. 1974).

[13] See, Revised Counselor's Guidebook, p. 14.

official" be named (in contrast the form used by the EEOC only requires that the company or the union be designated). Since most often the problem is with an immediate or close supervisor, this puts the complainant in the uncomfortable position of bringing charges against the person who will have the greatest control over his future career. The focus of the complaint process on seeking to establish individual, and usually overt, acts of discrimination, rather than on systemic problems impinging on minority employees as a class, was one of the main criticisms voiced by Congress in 1971.[14]

[14] "Aside from the inherent structural defects the Civil Service Commission has been plagued by a general lack of expertise in recognizing and isolating the various forms of discrimination which exist in the system. The revised directives to Federal agencies which the Civil Service Commission has issued are inadequate to meet the challenge of eliminating systemic discrimination. The Civil Service Commission seems to assume that employment discrimination is primarily a problem of malicious intent on the part of individuals. It apparently has not recognized that the general rules and procedures it has promulgated may actually operate to the disadvantage of minorities and women in systemic fashion. All too frequently policies established at the policy level of the Civil Service Commission do not penetrate to lower administrative levels. The result is little or no action in areas where unlawful practices are most pronounced. Civil Service selection and promotion requirements are replete with artificial selection and promotion requirements that place a premium on "paper" credentials which frequently prove of questionable value as a means of predicting actual job performance. The problem is further aggravated by the agency's use of general ability tests which are not aimed at any direct relationship to specific jobs. The inevitable consequence of this, as demonstrated by similar practices in the private sector, and, found unlawful by the Supreme Court, is that classes of persons who are culturally or educationally disadvantaged are subjected to a heavier burden in seeking employment." H.R. Rep. No. 92-238, on H.R. 1746, 92d Cong., 1st. Sess., at 24 (1971). See also, S. Rep. No. 92-415, in S. 2515, 92d Cong., 1st. Sess., at 14 (1971), cf., *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975).

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4a and b. ACCEPTANCE OR REJECTION OF THE COMPLAINT (713.215)

Theoretically, the EEO officer can reject a complaint *only* for procedural deficiencies; *e.g.*, untimeliness, failure to have first submitted to counseling, etc. Actually, however, some of bases for rejecting a complaint relate to the merits. The three grounds for rejecting a complaint specified in § 713.215 are: (1) untimeliness; (2) the complaint deals with the same subject matter as an earlier complaint; and (3) the issues raised are "not within the purview" of the discrimination regulations.

a. *Timeliness* (713.214(a)(i) and (ii))

A complainant must meet two limitation periods or his complaint will be rejected as untimely by the EEO officer. *First,* it is untimely if there was no event within 30 calendar days prior to the initial contact with the counselor. *Second,* it is untimely if not filed within 15 calendar days of the date of the complainant's final interview with the counselor. Neither of these requirements is established by statute, but has been imposed by regulation. In contrast, § 2000e-5(e) imposes a 180-day period in which private and state and local employees must file a complaint with the EEOC or a state F.E.P.C. Whether a failure to meet the Part 713 time requirements would bar a Title VII action has yet to be resolved by the courts, although they generally have declined to enforce them with the same rigidity as has CSC/ARB. See, *e.g. Hunt* v. *Schlesinger,* 389 F. Supp. 725 (W.D. Tenn. 1974).

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b. *Same Subject Matter as a Previous or Pending Complaint* (713.215)

The EEO officer must reject the allegations of a complaint "which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency." Presumably, if a complaint referred only to an event that was the subject matter of an earlier complaint it would necessarily be untimely and could be rejected on that basis. Therefore, the regulation could be read as requiring the rejection only of those allegations in the complaint (as opposed to the complaint as a whole) that relate to previously adjudicated or pending matters. On the other hand, if, for example, a complainant wishes to raise a charge of reprisal because of the filing of an earlier EEO complaint he must file a new complaint if the first complaint is on appeal to ARB, even though the second complaint would deal with matters related to a complaint already adjudicated by the agency.

c. *"Not Within Purview"* (713.215)

A significant number of complaints, or portions of complaints, are rejected as "not within the purview of § 713.212." The most important allegations so rejected are "general allegation[s] of discrimination . . . which [are] unrelated to an individual complaint of discrimination," (§ 713.212(b)), *i.e.,* class action type allegations. CSC/ARB has squarely held that:

> There is no provision in the Civil Service regulations for the processing of general allegations of discrimination within the context of individual complaints of discrimination.

Rather, such allegations have to be raised as a "third-party" complaint, under 713.251.[15]

There are three problems with the third-party complaint procedure. *First,* § 713.251 specifies that it applies only to general allegations "by organizations or other third parties" that are "unrelated to an individual complaint of discrimination." A recent memorandum explaining the third-party procedure issued by the Commission also makes it clear that a third-party complaint is not allowed if the allegations relate to the complaints of any individuals.[16] This ignores the obvious fact that in any racial discrimination case the whole point of making class allegations is that they *are* related to a particular person's individual complaints, and indeed affect all members of the discriminated-against group. See, *Sosna* v. *Iowa,* 419 U.S. 393, 413, n. 1 (White, *J.,* dissenting).

Second, the third-party allegations procedure is not adjudicatory in nature. As described in the regulation and in the recent memorandum, its purpose is simply "to call agency management's attention" to allegedly discriminatory policies. Third-party allegations are "handled solely through an agency investigation," [17] which,

[15] ARB, October 15, 1974 (*In re Williams*). There, the complainant had attempted to allege that women and minorities "as a class" were discriminated against by the agency's personnel policies pertaining to recruitment, hiring, promotions, and other aspects of employment. The allegation was rejected by the agency. See also, CRC Report at pp. 63-64; 68-69.

[16] Memorandum letter, dated January 27, 1975, from Irving Kator, Assistant Executive Director, USCSC, to Directors of Equal Employment Opportunity and Directors of Personnel.

[17] *Ibid.*

> Is not expected to cover individual cases in sufficient depth which necessarily would result in findings or decisions with respect to those individuals.[18]

There is no right to an appeal to the Civil Service Commission, rather, only a "review" can be sought. The review is not conducted by the Appeals Review Board as an adjucation of rights; rather it is handled by the regional CSC office or the CSC's Bureau of Personnel Management Evaluation. At most that review may result in a request to the agency to conduct a further investigation; there is no adjudication as such.

Third, consistent with the above, the CSC does *not* consider that the third-party allegation procedure under § 713.251 gives rise to the right to proceed in federal court under Title VII. Thus, § 713.282 provides when "an employee or applicant" will be notified of his right to file a civil action. It refers only to §§ 713.215, 713.217, 713.220, 713.221, and 713.234, viz., those sections relating to individual complaints, and excludes any reference to § 713.251. In accord with § 713.282, the Commission does not notify a third-party complainant of a right to bring action when it concludes its review under § 713.251(b). The Department of Justice has also taken the position that a third-party complaint cannot be the basis for filing a class action under Title VII.[19]

Thus, a complainant is faced with being unable to raise (or get investigated and adjudicated) class-type allega-

[18] *Ibid.*

[19] Brief for Appellees in *McLaughlin* v. *Callaway,* 5th Cir. No. 75-2261, p. 13.

tions,[20] and at the same time being relegated to a procedure that is both ineffective and irrelevant to the administrative adjudication of his complaint. Moreover, because class claims cannot be raised, complaints examiners consistently refuse to permit the introduction of evidence relating to discriminatory employment practices on the ground such evidence is not "relevant" to individual claims.[21]

Aside from the class allegation issue, the "not within purview" provision has been variously applied. Thus, for example, CSC/ARB has held that an agency correctly rejected a claim that "older blacks" had been discriminated against, since discrimination on the basis of age was not within the purview of Part 713.[22] ARB has reversed agency rejections as "not within purview" based on a finding that the complainant had not been discriminated against. Since this was in effect, a finding on the merits, the case was remanded for a hearing.[23] On the other hand, ARB has affirmed such a rejection by independently determining that since the complainant had been properly classified, he could not have been discriminated against.[24]

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[20] *Ibid.*

[21] See, e.g., ARB, No. 713-73-593. There, ARB upheld the refusal to call certain witnesses because, "they were to testify relative to the equal employment opportunity program with respect to Hispanic Americans," and such testimony was not "pertinent" to an individual claim of discrimination. See also, ARB, May 6, 1975 (*In re Williams*).

[22] ARB, No. 713-74-29.

[23] ARB, No. 713-74-402.

[24] RB071360089, Digest, 2, p. 19. This case demonstrates that the orientation of ARB personnel is towards standard personnel matters rather than discrimination. The complainant had filed an

Of great significance is whether the specific practice that harms the complainant is reviewable by the agency at all. Although § 713.212, by its terms, seems to encompass *all* discriminatory acts, in fact, it covers only those for which the agency is responsible. Thus, challenges to CSC exams, regulations, job qualifications, etc., are not within the purview of chapter 713.[25] Unfortunately, if the complainant makes a mistake on this ground, his complaint is simply rejected; it is not forwarded to the proper office (*e.g.*, the CSC if a test is at issue). By the time the complainant figures out he should be proceeding under a different part of the regulations it may be too late to file a timely complaint anywhere.[26] The explanatory materials prepared by

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EEO complaint charging the personnel officer with discrimination in refusing to reclassify his postion to a higher GS level. The agency found only that the position had been classified in accordance with the prescribed procedures, without, apparently, addressing the discrimination claim itself. ARB, on appeal, got an advisory opinion from the CSC Classification Appeals Office that there was no error in the classification. Therefore, since FPM Chapter 713 Appendix B, paragraph E-3.c(1)(b) requires proof that a *deliberate* error had been made, ARB found that the complainant was not within the purview of Part 713, and declined to accept the appeal.

[25] They must be filed under part 300 of Chapter 5, C.F.R.; see *infra*, pp. 38a-40a.

[26] There are variations on this problem. In one case a complainant filed with the CSC director of EEO claiming discrimination in the way the Federal Service Entrance Examination had been administered by the CSC. The complaint was rejected on the ground that the complainant had not sought employment with the CSC as an agency, but with the federal government generally. Therefore, the complaint was "not within purview." (Undoubtedly, if the complaint had been filed with any particular agency it would have been rejected on the ground that the agency had no authority to review actions of the CSC.) The letter decision says nothing about a Part 300 appeal or, indeed, any alternative way to get the merits of the national origin discrimination claim ad-

the CSC for dissemination to federal employees do not contain this information. See, "Fed. Facts 10", U.S. Civil Service Commission, October, 1973.

The EEO officer must also reject anything in the complaint relating to a matter not brought to the attention of the EEO counselor (713.218(a)(1)). This requirement is also rigorously applied.[26a] Finally, the officer may require that the complainant make his allegations specific rather than general on pain of having the complaint rejected. This usually entails naming an alleged discriminatory official or identifying some specific discriminatory action in contrast to alleging generally a failure to promote, etc. Again, EEOC practice, which allows the filing of the initial complaint in the most general terms, may be constrasted. See, *e.g., Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

4. c. and d. THE INVESTIGATION (713.216)

If the complaint is accepted, it is the EEO officer's duty to request an investigation and to handle any administrative chores necessary to ensure its being carried out. The investigator is supposed to be independent; nevertheless, in all instances he is an employee of the agency. As noted in *Morton* v. *Mancari, supra,* the House Committee report for the 1972 Amendments declared that, "the present law and the proposed statute do not permit in-

judicated administratively. (ARB No. 713-74-679). See also, ARB No. 713-74-561. The complainant charged discrimination by CSC in failing to find complainant "suitable for employment . . . with federal agencies in general, rather than with the [CSC]" as the employing agency. Therefore, the complaint was properly rejected as "not within the purview" of the regulations.

[26a] See, *e.g.*, ARB No. 713-73-540. See also, CRC Report at p. 69, and the Revised Investigator's Guidebooks, at pp. 6, 9.

dustry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly." H.R. Rep. No. 92-238, on H.R. 1746, *supra,* at 24-25.[27] Both House and Senate Committee reports criticized the resolution process as having "denied employees adequate opportunity for impartial investigation and solution of complaints" because "each agency is still responsible for investigating and judging itself." Senate Rep. No. 92-415, on S. 2515, 92d Cong., 1st Sess., at 24. See, also, CRC Report, p. 70.

As a matter of general practice, the investigation is limited as to both time and scope, despite language in the regulations that suggests the contrary.[28] Indeed, the investigator is specifically told *not* to enlarge "the scope of the investigation beyond the specific issues complained of" (Revised Investigator's Guidebook, p. 10), again in contrast to an EEOC investigation. The complainant has no control over what the investigator looks into, although he can suggest names of witnesses and is entitled to supply a detailed statement himself. The investigator must rely on local personnel for information. Statements are taken from witnesses *ex parte,* with the complainant having no right to be present or to have particular questions asked or

[27] See, Hearings on H.R. 6228 & H.R. 13517 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st & 2d Sess. at 112 (1970); Hearings on S. 2453, Before the Subcomm. on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., at 79 (1969).

[28] For example, 5 C.F.R. § 713.216(a) requires that the investigator shall investigate the "general environment" in the "organizational segment" of the complainant. This sounds like a broad class-systemic investigation. One agency, however, interprets "organizational segment" as being limited to the immediate office in which the complainant is located (in one instance, a three-person office).

pursued. (See, Investigator's Guidebook at 23, Revised Investigator's Guidebook at 14.) Nor can he require that particular information be collected.[29] A common pattern of investigation is the taking of short affidavits from individuals containing conclusory statements as to whether the accused individual is discriminatory. In addition, very general data relating to the agency's affirmative action plan is put into the record.

After completing the investigation, the investigator submits his report (all of which must be given to the complainant within 5 days). Although the practice varies, in most agencies the investigator makes no finding as to whether there has been discrimination. He may recommend a disposition of the complaint which is not binding on either party, but forms the basis of an attempt to informally resolve the complaint.

As in the counseling stage, the proposed dispositions are usually limited in scope. Again, since back pay can *not*

[29] Thus, in a number of cases complainant's counsel have submitted to investigators interrogatories requesting information obtained as a matter of course in Title VII cases. For example:

"1. Please provide the following statistical data on the New York Regional Office of the Drug Enforcement Administration:

(a) the number of employees by race, and by job category (or description) and by General Schedule Classification, as of (i) March, 1965; (ii) March, 1966; (iii) March, 1967; (iv) March, 1968; (v) March, 1969; (vi) March, 1970; (vii) March, 1971; (viii) March, 1972; (ix) March, 1973; (x) March, 1974; (xi) March, 1975.

(b) the number of Criminal Investigators employed by the New York Regional Office, by race, as of each of the dates specified in paragraph 1(a) immediately above."

Investigators have either ignored such requests or have declined to comply on the ground the information was "irrelevant" to an individual charge of discrimination (a conclusion directly contrary to *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973)).

be given without a finding of discrimination by the national agency head (or his designee), it cannot be obtained at this stage.[30] Occasionally, a promotion is offered;[31] more typically, the proposed relief involves training or consideration "as a strong candidate" for future vacancies.[32] Despite these limitations, some attempt at conciliation is a condition to proceeding to the next step in the process.

5. Letter of Proposed Decision (713.217)

If no agreement is reached, then 20 days after the investigative report is filed, the local EEO officer sends the complainant a Notice of Proposed Disposition by the local agency head. If the complainant is satisfied, or if he does nothing, the proposed decision of the local agency head automatically becomes the final agency decision. If he is not satisfied, he is given the option of either having a hearing, or having the national agency head or his designee, usually the Director of EEO, decide the merits based on the investigative record. He is informed that regardless of the option chosen he will be able to file an action under Title VII within 30 days after the final agency decision.[33]

6. Hearing Before a Complaints Examiner (713.2(8))

If the complainant elects a hearing, a complaints examiner employed by the CSC (usually from the regional

[30] See, Notices of Proposed Disposition of Discrimination Complaint from Joseph D. Atkinson, EEO officer, to Sylvester A. Barret and Gloria A. Williams, November 27, 1974, reproduced in App. C, *infra*, pp. 86a-89a.

[31] *Ibid.*

[32] *Ibid.*

[33] See, App. B, p. 79a, *infra*.

FEAA office) is assigned.[34] The complainant is sent a letter from the designated hearing examiner informing him that within 5 days after its receipt he must supply the names of all witnesses he wishes called, and a general statement of their testimony.[35]

The complaints examiner has no power to provide for the interviewing of witnesses or to require the agency to supply documents or information before the hearing. Requests for such pre-hearing discovery are met with the response that it is solely within the agency's discretion whether to comply.[36] On the other hand, the agency, and its representative, have full access to its own records and employees in order to prepare before hand. Thus, even the complainant who is represented by counsel is at a distinct disadvantage. See, *Rich* v. *Martin Marietta*, 522 F.2d 333, 342-43 (10th Cir. 1975). The production of documents at the hearing itself is no substitute for adequate discovery prior to the hearing. In an employment discrimination case it is typically necessary to propound supplemental interrogatories or to follow up on depositions in order to ferret out all necessary information.

The procedures for the hearing itself are detailed in 5 C.F.R. § 713.218, and in the Complaints Examiner's Handbook at pp. 34, *et seq.* At the hearing, as during the investigation, the complainant has the right to have a representative: however, he has no right to have a lawyer appointed and CSC/ARB has held that the regulations do not allow

[34] See, CRC Report, p. 76, n. 259, for a description of the qualifications of Complaints Examiners. Expertise in Title VII laws or employment discrimination matters is *not* required.

[35] See, Complaints Examiners' Handbook, p. 93.

[36] See, *e.g.*, Letter of Samuel F. Vesser, Jr., Assistant Appeals Officer, CSC, to Ms. Caryl Privett, March 13, 1975, reproduced in App. C at p. 90a, *infra*.

for counsel fees to a complainant who prevails in the administrative process.[37] Thus, if the complainant cannot afford to hire an attorney, he can get counsel only if he can convince a government-employed attorney to act as his representative. Under CSC regulations, only an attorney employed by the complainant's own agency, *i.e.*, the agency charged with discrimination, can do so on official time, if such representation is not "inconsistent with the faithful performance" of the attorney's regular duties as determined *by the agency*. An attorney from another agency can act as representative only by using up annual leave or by taking a leave without pay.[38] Thus, a complainant is generally represented by a lay person. In contrast, the agency, particularly the military departments, is usually represented by counsel.[39]

The hearing is *not* an adversary proceeding, but "an extension of the investigative process." Handbook, pp. 39, 53-54. Therefore, "the concept of burden of proof does not apply." *Ibid.* Moreover, although both the agency and the complainant are responsible for furnishing all the information they *have*, neither has the burden of producing all of the evidence in support of his position. Rather, it is the

[37] ARB, November 8, 1974 (*In re Brown*).

[38] FPM Bulletin No. 713-41, October 10, 1975.

[39] See, *e.g.*, *ARB*, September 25, 1975 (*In re Howard, et al.*). There, the complainants arrived prepared to represent themselves. When they discovered that the agency (the Air Force) would be defended by a military lawyer, they protested that such a proceeding would be unfair. As ARB recited:

> The hearing was terminated when the complainants withdrew from the hearing because the agency was represented by an attorney. They requested that the agency furnish them with an attorney but were told that there was no provision for legal aid. *Id.*, at p. 2.

responsibility of the examiner to elicit testimony and to obtain witnesses or evidence that are needed. *Id.*, at pp. 39-40, 55-57. Even though the complainant presents his case first, he is not "required to prove discrimination." *Id.* at 56.

Although this procedure *sounds* good, in operation its non-adversarial nature works to the complainant's disadvantage. The fact of the matter is that if it is not proven; (1) that there was discrimination; (2) that the complainant was the victim of it; and (3) that it is "clear" that "but for" the discrimination he would have been given the job in question, then the complainant will lose. Thus, if he relies on the apparent duty of the complaints examiner to develop all the relevant proof, when he gets the decision of the agency and ARB he will discover that he indeed had a burden of proof after all. The decisions of ARB in particular are replete with comments on failure to prove discrimination or deficiencies in the record that result in the rejection of the complainant's claims.[40]

The complaints examiner has wide latitude in deciding what evidence is admissible. Although some of the rules of evidence, particularly regarding the admissibility of hearsay in the form of affidavits, are not strictly applied, the standard of relevance is in fact narrower than in Title VII court actions. This is most noticeably the case regarding evidence of patterns of class discrimination; it is typically excluded, and the exclusion is upheld on the ground that the examiner has "the duty of conducting the hearing in such a way as to adduce evidence pertinent to the complaint, and to exclude testimony or information which is

[40] See, e.g., ARB, October 4, 1974 (*In re Jones*), reproduced in App. C, pp. 82a-85a, *infra*.

not pertinent."[41] In practice, this means that it is "assumed" that all pertinent evidence is in the Investigator's report, and that the exclusion of evidence is justified.[42]

Following the hearing, the examiner makes a recommended decision to the agency head. As with the former regulations, "the conclusions and findings of the examiner are in the nature of recommendations to the agency head who makes the final agency determination as to whether discrimination exists." H.R. Rep. No. 92-238, on H.R. 1746, *supra*, at 24; Senate Rep. No. 92-415, on S. 2515, *supra*, at 14. The complainant does *not* have the right to see, review or comment on the examiner's recommendation or to see the transcript prior to the final agency decision. See, Handbook, p. 79; §§ 713.218(g) and 713.221(b)(2). Thus, he has no opportunity to influence the agency decision, or to file a memorandum based on a review of the transcript of testimony. This is in contrast to, *e.g.*, the opportunity to comment on or object to a master's report prior to a district court's decision under F.R. Civ. Proc., Rule 53(e)(2). *Cf.*, 42 U.S.C. § 2000e-5(f)(5).

7. Final Agency Decision (713.221)

Most agencies have delegated responsibility for making the decision to a director of EEO. If the agency decides *not* to adopt the examiner's recommended decision the regulations state that reasons for the rejection are to be given (5 C.F.R., § 713.221(b)(2)). Unfortunately, this provision was rendered ineffective by the Civil Service Commission itself when it held that as long as CSC/ARB gave reasons why a decision was made, the agency need not do

[41] ARB, 713-73-593, at p. 3.

[42] *Ibid.*

so.[43] In a significant number of instances proposed decisions finding discrimination are not followed by agencies.[44] Based on the report of the hearing (or on the investigative file if the complainant has chosen not to have a hearing) the national department or agency head, or his designee, makes a decision (5 C.F.R. § 713.221). The decision is to require remedial or corrective action if necessary. The complainant must be sent a copy of the report of the examiner and the hearing record, along with the agency decision.

8.-10. Appeal to CSC/ARB (713.231-713.234)

The complainant is informed of his right either to appeal to CSC/ARB within 15 days or to file an action in federal court within 30. If the former option is chosen, a new 180-day period commences. The decision of CSC/ARB is final[45] and a civil action must be filed within 30 days of receipt of notice thereof. During consideration of

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[43] This ruling was handed down by the CSC in three cases (including one now before this Court *sub nom., Salone* v. *United States*, No. 74-1600), in which the Commission declined to reopen and review an ARB decision. The Commission's general counsel had requested reopenings on the ground the agencies had not given reasons for not following the recommended decisions of the complaints examiners. The Commission declined to reopen because ARB had detailed reasons for the final decision rendered. (Minutes of U.S.C.S.C., Feb. 27, 1974). The problem with this result is that there is no reason for the agency to give reasons, since if an appeal is taken to ARB, that body will detail reasons.

[44] In Fiscal Year 1974, agencies reversed 29 out of 109 Examiner's findings of discrimination (26.6%). In contrast, they reversed only 7 out of 534 findings of *no* discrimination (1.3%).

[45] Except that the Commission itself has the discretion to reopen under § 713.235. See, *supra*, pp. 3a-4a. Such reopenings may be on the initiative of the Commission, the agency, or the complainant.

the 1972 Amendments, Congress expressly stated that, "The system which permits the Civil Service Commission to sit in judgment over its own practices and procedures which themselves may raise questions of systemic discrimination, creates a built-in conflict-of-interest." H.R. Rep. No. 92-238, on H.R. 1746, *supra* at 24.

Congress also criticized ARB because it "rarely reverses the agency decision" on discrimination (*Ibid*). This is still the case. The government's own statistics show that in the first three fiscal years since § 2000e-16 went into effect (July 1, 1972 to June 30, 1975), ARB decided 1,354 EEO appeals on the merits.[46] It reversed agency findings of no discrimination in only 45 cases, or 3.32%. In other words, ARB *itself* found discrimination only in those 45 instances.[47] Even if the appeals where ARB ordered further corrective action without disturbing the agency finding as to discrimination are included, complainants received favorable ARB dispositions on other than procedural issues in only 137 out of a total of 1,389 appeals, less than 10% of the cases.[48]

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[46] See App. C, p. 53a, Brief for Respondents in *Brown* v. *G.S.A.*, No. 74-768. The figure of 1,354 is arrived at by totalling for the three fiscal years the appeals in the categories, "Affirmed—Agency found no discrimination"; "Affirmed—Agency found no discrimination (but further corrective action recommended by ARB"; "Reversed—Agency found no discrimination." The other categories involve either procedural questions (i.e., untimeliness), or appeals where the agency itself had found discrimination so that that question was not at issue. But see, text at n. 48, *infra*.

[47] Two of *those* cases were reopened and vacated by the Commission under § 713.251.

[48] The total figure was arrived at by adding in the totals for the categories: "Affirmed—Agency found discrimination"; and "Affirmed—Agency found discrimination (further corrective action recommended by ARB)." The figure 137 was arrived at by adding

Appendix A

CORRECTIVE AND REMEDIAL ACTION (713.271)

Either the agency or the CSC can order certain specified corrective or remedial action as specified in § 713.271. Corrective action is ordered in a significant number of cases even though discrimination is *not* found. The reason for this may be that if there is no finding of discrimination then no back pay can be awarded. Thus, both agencies and the CSC give some future relief but avoid expending government funds.

Even if discrimination is found, back pay cannot be granted unless it is shown that a promotion would have been given "but for" the discrimination, a rule directly contrary to that applied by courts in Title VII actions (see the discussion in the Brief, *supra*). This rule is rigorously applied and awards of back pay government-wide have been rare indeed. Thus, in fiscal year 1974, only 40 federal employees received back pay[49] as a result of agency action. This is in dramatic contrast to the private sector, where the EEOC, without the plenary power that federal agencies or the CSC have over federal employment, obtained in the same fiscal year back pay for 49,388 employees in the amount of $56,266,827 through conciliation.[50]

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to the 45 cases where ARB itself actually found discrimination, those cases where it affirmed agency findings of discrimination or where, although it affirmed findings of *no* discrimination, it ordered further corrective action.

[49] Brief for Respondents, *Brown* v. *G.S.A.*, p. 49, n. 28; which states that back pay was granted in only 4 per cent of the 985 agency dispositions on the merits.

[50] Letter from Marty Rogers, Special Assistant to the Executive Director of EEOC to Eric Schnapper, Esq., November 21, 1975. In FY 1975 EEOC obtained $109,669,285 in back pay for 51,216 employees (see, App. C, p. 91a).

Appendix A

Since a complainant cannot prosecute his complaint on behalf of a class, such relief as there is is limited to his individual problem. Thus, in a case where discrimination against black civilian employees generally at a major installation was shown, the Air Force granted only very limited relief. An appeal was taken to ARB requesting that broad class relief of the kind given in private Title VII cases be afforded.[51] ARB held that it could not give relief other than that specified in § 713.271(b).[52] Therefore, the appeal was denied.[53] Finally, the third-party complaint provision states that the Commission may order back pay if it finds discrimination (§ 713.251(c)). *Amicus* has received from the Commission copies of all final third-party orders; back pay has *never* been ordered either for an individual or for a class.

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[51] The requested relief included class-wide back pay, upgrading of blacks to proper seniority levels, appointment of blacks to supervisory positions, a revision of the rating and supervisory assessment system to eliminate discriminatory factors, costs and attorneys' fees.

[52] That is, individual relief limited to: retroactive promotion or back pay subject to the "but for" rule; priority consideration for a promotion; cancellation of an unwarranted personnel or disciplinary action; and full opportunity to participate in benefits that had been denied him.

[53] ARB, September 25, 1975 (*In re Howard, et al.*). See also, *e.g.*, ARB No. 713-74-203 (relief to women generally *cannot* be given even where there is proof of class discrimination); ARB, May 6, 1975 *(In re Williams)* (ARB noted complete absence of blacks in position in question, but only suggested that the "agency might consider the possibility" of instituting an affirmative action program); ARB No. 713-74-577 (Complaints Examiner should not order class relief in an individual case; see Handbook, pp. 73-74.)

Appendix A

D. *Other C.S.C. Procedures*

1. Charges of Reprisal

The regulations (5 C.F.R. § 713.261-713.262) provide two procedures to make a charge that a complainant has suffered reprisal because he has filed an EEO complaint. He can file a *complaint* of reprisal making the allegation and have it processed under the procedures described above (§ 713.262(a)), or he can file a charge of reprisal under the provisions of § 713.262(b). This section purports to furnish an expedited procedure by which immediate relief can be obtained if there is a reprisal. The charge must be filed with the agency head or EEO officer within 15 days after the act of reprisal. Within 15 days the agency is to send the CSC a copy of the charge and a report of the action taken in response. If the agency has not acted within 15 days, or if adequate corrective action has not been taken, the complainant may submit a statement to the CSC, which can make the agency take appropriate action.

The effectiveness of this procedure is yet to be demonstrated. The CSC (through the office of the Director of Equal Employment Opportunity) has taken the position that the procedure is not intended to allow interference with normal personnel actions. This translates to mean that if, e.g., an employee is fired after filing a complaint, the CSC will take the agency's word that the firing was done in the normal course of business, will not interfere, and will require the employee to pursue the regular adverse action appeal procedures.

2. Adverse Action Appeals

If a federal employee has been fired, suspended, or has had some other adverse action taken against him, he is

Appendix A

entitled to an appeal under 5 C.F.R. Part 772. The appeal is to the Federal Employees Appeals Agency at the regional CSC office. There is then a right to petition the Appeals Review Board of the CSC, which has discretion as to whether or not it will hear the case.[54]

Section 772.306 provides that if an employee makes an allegation that an adverse action was based in whole or in part on discrimination, he shall be given the option either to have that complaint processed under Part 713, or to have the allegation adjudicated by the FEAA as part of the appeals process. In either case, an investigation is held by the agency pursuant to 5 C.F.R. 713.216, but the initial decision on the discrimination claim is made either by the local agency or by the FEAA appeals examiner, depending on which route is taken. If the FEAA route is taken one of the procedural steps is shortcutted. There is still a hearing on the discrimination complaint, but the hearing occurs without a local agency proposed decision (*i.e.*, step 5 on the flow chart is omitted), and there is no final decision by the national agency head.

There are two problems with the FEAA option. *First*, if the adverse action is reversed because the agency failed to comply with procedural requirements (a common result), the discrimination claim will not be reached. *Second*, the regulations do not provide that a complainant electing to proceed under Part 772 will be told of his right to sue

[54] The system was extensively revised in July, 1974. Prior to the revision, an employee had the option of a hearing by the agency, with review by the C.S.C., or a hearing by a C.S.C. appeals examiner, with review by the C.S.C. This option has been eliminated, and a one-step review procedure substituted. Part 771, provides procedures by which an employee may present any grievance (*i.e.*, "any matter of concern or dissatisfaction"), to an agency for resolution, and Section 771.109 provides that any allegation of discrimination made in connection with a grievance shall be processed under Part 713. 5 C.F.R. 713.219 was appropriately amended.

under Title VII, and in fact he is not even if the merits of his EEO claim are reached.

3. Probationary Employees

If a non-tenured federal employee is separated at the end of his probationary period for "failure to make satisfactory progress in training," he can appeal on the ground of discrimination under Part 315 of 5 C.F.R., or file a 713 complaint.[55] If he goes the 315 route, the appeal is to the regional FEAA of the CSC. The FEAA requires the local agency head to conduct an investigation pursuant to Part 713 and send the investigative report to the FEAA. The employee is given an opportunity to review and comment upon the investigative report within 10 days, but there is no hearing. After the FEAA decision, there is an appeal to CSC/ARB pursuant to 5 C.F.R. 772.310. Neither FEAA nor CSC/ARB informs the employee of his right to sue under Title VII.[56]

4. Challenges to Job Qualifications

There are three different sources for job qualifications such as tests, educational requirements, etc., that may give rise to discrimination charges:

1. The Agency;
2. The CSC (*e.g.*, CSC examinations);
3. Statute (*e.g.*, Veterans Preference)

[55] The only other grounds for appeal are that the termination was based on partisan political reasons, marital status, or physical handicap.

[56] See, *e.g.*, ARB, October 31, 1975 *(In re Harris)*. The *Harris* case again demonstrates the orientation of the process towards ordinary personnel issues, and the limited nature of the inquiry. ARB held that it could not "review . . . the sufficiency of the reasons for termination. . . ." Thus, it failed to inquire whether the reason given for the dismissal of the complainant were pretextual (within the meaning of *McDonnell Douglas* v. *Green*), and essentially accepted those reasons at face value.

If a complainant challenges an *agency* imposed job qualification, he simply files a complaint under Part 713 and it is processed accordingly.

If he seeks to challenge a CSC imposed requirement, he cannot file under Part 713, since an agency has no power to alter a CSC rule. He must file an appeal under 5 C.F.R. Part 300, especially §§ 300.102-104.[57] The appeal must be filed within 15 days of the date of application of the employment or the date the complainant became aware of the results of the application of the practice. Thus, if an

[57] 5 C.F.R. § 300.103(b) and (c).

(b) Relevance. (1) There shall be a rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed. A minimum educational requirement may not be established except as authorized under section 3308 of title 5, United States Code.

(2) In the case of an entry position the required relevance may be based upon the target position when—

(i) The entry position is a training position or the first of a progressive series of established training and development positions leading to a target at a higher level; and

(ii) New employees, within a reasonable period of time and in the great majority of cases, can expect to progress to a target position at a higher level.

(c) Equal employment opportunity. An employment practice shall not discriminate on the basis of race, color, religion, sex, national origin, partisan political affiliation, or other nonmerit factor. This requirement is generally met when an employment practice is relevant to performance in the position to be filled (or in the target position in the case of an entry position).

5 C.F.R. §300.104:

(a) *Employment practices.* (1) A candidate who believes that an employment practice which was applied to him and which is administered or required by the Commission violates

employee goes to an EEO counselor within the thirty days provided by Part 713 on the assumption that that is the proper procedure, he will be too late to proceed under Part 300. See text at n. 26, *supra*. The appeal must set forth the basis of the complainant's belief that the employment practice discriminates against him. The regulations do not provide for an investigation; however, the appeal is processed under the provisions of Part 772, Subpart D and therefore the Appeals Review Board will provide the option of having the case decided on the record or having a hearing before a member of the Board or an appeals officer (5 C.F.R. § 772.403).

The third category of job qualifications are those set by statute. The CSC has held that challenges to such qualifications are not within the purview of the regulations, since the CSC has no power to alter them.

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a basic requirement in section 300.103 is entitled to appeal to the Commission.

(2) An appeal shall be in writing, shall set forth the basis for the candidate's belief that a violation occurred, and shall be filed with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415, no later than 15 days from the date the employment practice was applied to the candidate or the date he became aware of the results of the application of the employment practice. The board may extend the time limit in this subparagraph for good cause shown by the candidate.

(3) An appeal shall be processed in accordance with subpart D of part 772 of this chapter.

• • •

(c) *Complaints and grievances to an agency.*

(1) A candidate may file a complaint with an agency when he believes that an employment practice which was applied to him and which is administered or required by the agency discriminates against him on the basis of race, color, religion, sex, or national origin. The complaint shall be filed and processed in accordance with subpart B of Part 713 of this chapter.

APPENDIX B

Federal Personnel Manual Letter No. 713-17

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FPM LTR. NO. 713-17

UNITED STATES CIVIL SERVICE COMMISSION

FEDERAL PERSONNEL MANUAL SYSTEM

LETTER

Washington, D.C. 20415
November 3, 1972

FPM LETTER NO. 713-17

SUBJECT: Revisions in Equal Opportunity Regulations (Part 713)

Heads of Departments and Independent Establishments:

The purpose of this Letter is to provide a summary of the major revisions to the Equal Opportunity regulations (part 713) and to transmit the revised regulations as well as to prescribe certain actions to be taken by agencies in connection with these changes.

The regulatory changes have been made to implement the Equal Employment Opportunity Act of 1972 (P. L. 92-261), and to strengthen the system of discrimination complaint processing. They are designed to assure employees and applicants of their right to fair and fast adjudication of discrimination complaints and to assure that agencies move affirmatively in accordance with the law in effecting equal employment opportunity for all persons.

In accordance with the requirements of P. L. 92-261 regarding consultation with interested groups, the revised regulations were adopted after consultation with representatives of civil rights organizations, women's groups, labor organizations and Federal agencies.

SIGNIFICANT CHANGES ADOPTED

The following is a summary of the major changes in the regulations:

- To emphasize the affirmative aspects of agency equal employment opportunity obligations, the requirements for submission of national and regional EEO plans and the responsibility of agency heads to assure that principal and operating EEO officials meet qualification requirements are stated. (Sections 713.203; 713.203(e); and 713.204(d)(1))

- Agencies are required to designate a Federal Women's Program Coordinator with responsibility for advising the Director of EEO on matters affecting the employment and advancement of women. (Section 713.204(c))

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CSC CODE 713, Equal Employment Opportunity

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- Agencies are required to publicize and post permanently on bulletin boards the names and addresses of various EEO officials. (Section 713.204(f))

- Agencies are required to make reasonable accommodation to the religious needs of applicants and employees (including those who observe the Sabbath on other than Sunday) when the accommodation can be made by a substitution of a qualified employee, a grant of leave, or other means without undue hardship on the business of the agency. The agency has an affirmative duty to attempt to accommodate and if a complaint arises in this connection, the agency has the duty to demonstrate its inability to accommodate. (Section 713.204(g))

- The time limit for contacting an EEO Counselor is extended from 15 to 30 calendar days from the date of the alleged discriminatory act (Section 713.214(a)(1)(i)) and agencies are required to assure that full cooperation is provided the counselor by all employees in the performance of his duties (Section 713.213(b))

- In addition to the EEO Officer, the officials designated to receive a complaint include the head of the agency, the Director of EEO, the head of a field establishment, a Federal Women's Program Coordinator and any other officials designated for this purpose by the agency. (Section 713.214(a)(2))

- Counselors are prohibited from attempting in any way to restrain a person from filing a complaint of discrimination. Counselors may not advise a person not to file a complaint. (Section 713.213.(a))

- The time limit for completion of counseling has been converted from 15 work days to 21 calendar days for consistency with other time limits which are stated in calendar days. (Section 713.213(a))

- If the final counseling interview is not completed in 21 days, the counselor must on the 21st day notify the person counseled of his right to file a complaint at any time thereafter and up to 15 days after the final interview has been conducted. (Section 713.213(a))

- If after investigation of the complaint an adjustment is not arrived at, the complainant is allowed 15 days instead of seven from the date of receipt of the proposed disposition to request a hearing. The complainant's request must be in writing. (Section 713.217(b))

- When there is a finding of discrimination, agencies must take remedial action, with or without back pay, as appropriate, and must review the case to determine if disciplinary action should be taken and record the basis for the decision to take or not to take disciplinary action. (Section 713.221(c))

- Where an action otherwise appealable to the Commission involves a discrimination issue, the agency must inform the employee of his right to elect to proceed under this part.. (Section 713.236)

- A complaint is deemed filed (for the purpose of determining the running of time limits) on the date it is delivered to an agency official designated to receive complaint or, if mailed to such officials, on the postmark date. (Section 713.214(a)(3))

- Agencies are required to acknowledge receipt of complaints in writing and in the acknowledgement notice advise the complainant of all his rights, including appeal to the Commission and right to file a civil action. (Section 713.214(a)(3))

- Expedited procedures are provided for action on complaints of coercion or reprisal by a complainant, his representative, or by a witness. Allegations may be handled during the hearing on the original complaint, or, if a charge arises before a hearing, agencies will be required to investigate and report to the Commission on actions taken on the charge within 15 days of receipt of the charge. (Section 713.262)

- Agencies are required to furnish the investigative file promptly to the complainant and provide him an opportunity to discuss the file with appropriate officials. (Section 713.217(a))

- Complaints must be resolved within 180 days of filing. Agencies are required to report monthly to the Commission on pending complaints. If a decision on the complaint has not been made within 75 days of filing and the Commission has not been requested to supply a complaints examiner within that period of time, the agency will be required to take whatever measures the Commission considers appropriate to expedite processing or the Commission may assume responsibility for processing the complaint, including making the investigation (on a reimbursable basis) and requiring the agency to propose a disposition to the complainant within 15 days of receipt of the investigator's report. (Section 713.220(e))

- A recommendation for a finding of discrimination by a Complaints Examiner will become a final decision of discrimination binding on the agency 30 days after the recommendation is made, where the agency has failed to issue a final decision within 180 days of filing of the complaint. (Section 713.220(d))

- Remedial action on behalf of applicants or employees in cases where there is a finding of discrimination must be taken by the agency. If an applicant has been denied employment because of

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discrimination. the agency shall offer him employment and the title and grade denied him. Appointment shall be retroactive to the date the applicant would have been hired. Back pay shall be awarded from the beginning of the retroactive period. Both the appointment and the back pay may not extend from a date earlier than 2 years prior to the date the complaint was initially filed.

Similar action (including back pay) shall be taken when it is determined that an employee was discriminated against and it is reasonable to believe that he was denied a promotion, or other employment benefit. Back pay liability where there is a retroactive promotion is limited to two years prior to the date the complaint was filed but in any event not to exceed the date the complainant would have been promoted.

Findings of discrimination involving awards of back pay and retroactive appointments or promotions may be made by the agency or by the Commission on their own motion and not based on complaints. In such event, the period of retroactivity may extend up to two years prior to the date the finding of discrimination was recorded, but in the case of a retroactive promotion not to exceed the date the employee would have been promoted absent the discrimination.

Where there is a finding of discrimination and it is not clear that except for the discrimination the complainant would have been promoted, he must be given consideration for promotion to a position for which he is qualified before consideration is given to other candidates and if not selected, the agency must record the reasons for such nonselection. Similar priority consideration must be given to an applicant where there is finding of discrimination but no reasonable certainty that the complainant would have been hired. (Section 713.271)

- Complainants must be notified of their rights under the complaint procedures and the time limits applicable thereto including the right to file a civil action in an appropriate U.S. District Court. (Section 713.281)

  Notice of right to file a complaint must be provided by the Counselor; the receipt of the complaint must be acknowledged by the Director of EEO or EEO Officer and the complainant advised of his administrative rights and right to file a civil action; and the decision letter on a complaint must inform the complainant of his right to appeal to the Commission and to file a civil action in an appropriate U.S. District Court. (Sections 713.213(a); 713.214(a)(3); 713.215; 713.217(c); 713.220(d); and 713.221(d))

- Complaints by third parties or organizations must be investigated by the agency and the agency must prepare a file reflecting the results of the investigation and make the file available to the complaining parties along with its decision on the complaint. Within 30 days, the complaining party may request that the decision be reviewed by the Commission which may require additional investigation by the agency or make its own investigation and order such corrective action, including back pay, as it deems appropriate. (Section 713.251)

- Officials conducting discrimination complaint hearings are referred to as "Complaint Examiners" in lieu of "Appeal Examiners". In addition to present authority, they are also authorized to require the appearance of an employee of any Federal agency if he has information pertinent to the complaint under consideration. (Section 713.218(c))

EFFECTIVE DATES

With the exception of section 713.271, the regulation changes become effective December 1, 1972. Section 713.271 dealing with remedial action, including back pay, is retroactive to March 24, 1972, the effective date of enactment of The Equal Employment Opportunity Act of 1972.

ACTIONS REQUIRED BY AGENCIES

Agencies must take certain actions prior to the effective date of the regulations to assure employees of their rights under the regulations:

1. All persons responsible for the administration of the equal employment opportunity program must be advised as quickly as possible of the changes in the regulations and the way in which the changes affect their responsibilities. Directors of Equal Employment Opportunity, Equal Employment Opportunity Officers, Federal Women Coordinators and other officials have new or changed responsibilities as explained in the regulation changes noted above and they must be informed of these responsibilities.

2. All final decisions made on or after March 24, 1972, which involved a finding of discrimination must be reviewed to determine if back pay or retroactive promotion or appointment is in order; if so, such action should be taken. Section 713.271 of the regulations should be cited as authority for the action.

3. Officials authorized to receive complaints must be advised to forward complaints immediately upon receipt to the Director of Equal Employment Opportunity or an Equal Employment Opportunity Official so there will be no delay in undertaking processing of complaint. The Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Official will order the investigation.

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4. Take all feasible steps to publicize the following information:

   - The names and addresses of the Director of Equal Employment Opportunity, the Federal Women's Program Coordinators, and the appropriate EEO Officer and Counselors.

   - The time requirements for contacting an EEO Counselor.

   This information must be posted permanently on official bulletin boards but other means, such as employee bulletins and letters, should be used to make sure employees know who to contact in connection with a complaint of discrimination and the time limits for contacting a counselor.

5. Prepare required notices to complainants and distribute them to appropriate officials for their use in discrimination complaint processing. (See samples attached.)

6. Undertake any training programs necessary to acquaint counselors and other EEO officials of their responsibilities under the revised regulations. Commission training programs in Washington and in the field will be available to assist agencies in this regard.

7. Review the agency's entire complaint processing system and make necessary changes to assure that all complainants will receive a final decision within 180 days of filing.

8. Take special measures immediately to make a final agency decision in all discrimination complaint cases pending over 180 days.

By direction of the Commission:

Bernard Rosen
Executive Director

Attachment
1. Regulations
2-6 Sample notices

Attachment 1 to FPM Ltr. 713-17

Part 713 -- EQUAL OPPORTUNITY

(Present regulations are shown in right-hand column -- deleted material is bracketed; added material is shown in left-hand column)

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SUBPART B. EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

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SUBPART C. MINORITY GROUP STATISTICS SYSTEM

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SUBPART D. EQUAL OPPORTUNITY WITHOUT REGARD TO POLITICS, MARITAL STATUS, OR PHYSICAL HANDICAP

713.401 Equal opportunity without regard to politics, marital status, or physical handicap

AUTHORITY: The provisions of this part 713 issued under 5 U.S.C. 1301, 3301, 3302, 7151-7154, 7301; E.O. 10577; 3 CFR, 1954-1958 Comp., p. 218, E.O. 11222, 3 CFR 1964-1965 Comp., p. 306, E.O. 11478, 3 CFR 1969 Comp.)

; 86 Stat. 111;

SUBPART A. [RESERVED]

SUBPART B. EQUAL OPPORTUNITY WITHOUT REGARD TO RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

General Provisions

Sec. 713.201 **Purpose and applicability.** (a) *Purpose.* This subpart sets forth the regulations under which an agency shall establish a continuing affirmative program for equal opportunity in employment and personnel operations without regard to race, color, religion, sex, or national origin and under which the Commission will review an agency's program and entertain an appeal from a person dissatisfied with an agency's [processing of] his complaint of discrimination on grounds of race, color, religion, sex, or national origin.

decision or other final action on

(b) *Applicability.* (1) This subpart applies (i) to military department as defined in section 102 of title 5, United States Code, executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, →the United States Postal Service, and the Postal Rate Commission,← and to the employees thereof, including employees paid from nonappropriated funds, and (ii) to those portions of the legislative and judicial branches of the Federal Government and the government of the District of Columbia having positions in the competitive service and to the employees in those positions.

(2) This subpart does not apply to aliens employed outside the limits of the United States.

Sec. 713.202 **General policy.** It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

Sec. 713.203 **Agency program.** The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall[to the maximum extent possible]:

and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employees by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis;

(f) Participate at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability;

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(h) Provide recognition to employees, supervisors, managers, and units demonstrating superior accomplishment in equal employment opportunity;

labor — (i) Inform its employees and recognized employee organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation;

(j) Provide for counseling employees and applicants who believe they have been discriminated against because of race, color, religion, sex, or national origin and for resolving informally the matters raised by them;

(k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin; and

(l) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort.

Sec. 713.204 Implementation of agency program. To implement the program established under this subpart, an agency shall:

(a) Develop the plans, procedures, and regulations necessary to carry out its program established under this subpart;

(b) Appraise its personnel operations at regular intervals to assure their conformity with the policy in section 713.202 and its program established in accordance with section 713.203;

as many — (c) Designate a Director of Equal Employment Opportunity [and such] Equal Employment Opportunity Officers [and] Equal Employment Opportunity Counselors, as may be necessary, to assist the head of the agency to carry out the functions described in this sub-

Federal Women's Program Coordinators, and other persons

part in all organizational units and locations of the agency. The functioning of the Director of Equal Employment Opportunity, the Equal Employment Opportunity Officer, and the Equal Employment Opportunity Counselor shall be subject to review by the Commission. The Director of Equal Employment Opportunity shall be under the immediate supervision of the head of his agency, and shall be given the authority necessary to enable him to carry out his responsibilities under the regulations in this subpart;

and the qualifications of the persons so designated

(d) Assign to the Director of Equal Employment Opportunity the functions of:

(1) Advising the head of his agency with respect to the preparation of plans, procedures, regulations, reports, and other matters pertaining to the policy in section 713.202 and the agency program required to be established under section 713.203;

national and regional equal employment opportunity

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting thereon to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial or supervisory employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and improve the agency's program for equal employment opportunity;

(4) Providing for counseling, by an Equal Employment Opportunity Counselor, of any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin and for attempting to resolve on an informal basis the matter raised by the employee or applicant before a complaint of discrimination may be filed under section 713.214;

(5) Providing for the receipt and investigation of individual [complaints] of discrimination in personnel matters within the agency, subject to sections 713.211 through 713.222;

complaints

(6) Providing for the receipt, investigation, and disposition of general allegations by organizations or other third parties of discrimination in personnel matters within the agency [which] are unrelated to an individual complaint of discrimination subject to sections 713.211 through 713.222, under procedures determined by the agency to be appropriate, with notification of decision to the party submitting the allegation.]

subject to section 713.251;

(7) When authorized by the head of the agency, making the decision under section 713.221 for the head of the agency on complaints of discrimination and ordering such corrective measures as he may consider necessary, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee has been found to have engaged in a discriminatory practice; and

(8) When not authorized to make the decision for the head of the agency on complaints of discrimination, reviewing, at his discretion, the record on any complaint before the decision is made under section 713.221 and making such recommendations to the head of the agency or his designee as he considers desirable, including the recommendation for such disciplinary action as is warranted by the circumstances when an employee is found to have engaged in a discriminatory practice;

(e) Insure that equal opportunity for women is an integral part of the agency's overall program by assigning to the Federal Women's Program Coordinators the function of advising the Director of Equal Employment Opportunity on matters affecting the employment and advancement of women;

(f) Publicize to its employees and post permanently on official bulletin boards:

(1) The names and addresses of the Director of Equal Employment Opportunity and the Federal Women's Program Coordinators;

(2) The name and address of the appropriate Equal Employment Opportunity Officer;

[(e) Publicize to its employees:
(1) The name and address of the Director of Equal Employment Opportunity;
(2) Where appropriate, the name and address of an Equal Opportunity Officer; and]

(3) The name and address of the Equal Employment Opportunity Counselor and the organizational units he serves; his availability to counsel an employee or [qualified] applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin; and the requirement that an employee or [qualified] applicant for employment must consult the Counselor as provided by section 713.213 about his allegation of discrimination because of race, color, religion, sex, or national origin before a complaint as provided by section 713.214 may be filed;

and

(4) Time limits for contacting an Equal Employment Opportunity Counselor;

(g)

(by substitution of another qualified employee, hardship on

If an agency cannot accommodate an employee or applicant, it has a duty in a complaint arising under this subpart to demonstrate its inability to do so;

(h)

; and

(i) Submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to --

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

The head of each department and agency shall comply with the rules, regulations, orders, and instructions issued by the Commission.

[(f) Make reasonable accommodations to the religious needs of applicants and employees, including the needs of those who observe the Sabbath on other than Sunday, when those accommodations can be made (by a grant of leave, a change of a tour of duty, or other means) without undue interference with the business of the agency or with the rights of other applicants or employees; and

(g) Make readily available to its employees a copy of its regulations issued to carry out its program of equal employment opportunity.]

Sec. 713.205 **Commission review and evaluation of agency program operations.** The Commission shall review and evaluate agency program operations periodically, obtain such reports as it deems necessary, and report to the President as appropriate on overall progress. When it finds that an agency's program operations are not in conformity with the policy set forth in section 713.202 and the regulations in this subpart, the Commission shall require improvement or corrective action to bring the agency's program operations into conformity with this policy and the regulations in this subpart.

Agency Regulations for Processing Complaints of Discrimination

Sec. 713.211 **General.** An agency shall ensure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion, sex, or national origin comply with the principles and requirements in sections 713.212 through 713.222.

Sec. 713.212 **Coverage.** (a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he has been discriminated against because of race, color, religion, sex, or national origin. A complaint may also be filed by an organization for the aggrieved person with his consent.

with that agency

(b) Sections 713.211 through 713.222 do not apply to the consideration by an agency of a general allegation of discrimination by an organization or other third party which is unrelated to an individual complaint of discrimination subject to sections 713.211 through 713.222.

(Section 713.251 applies to general allegations by organizations or other third parties.)

Sec. 713.213 **Precomplaint processing.** (a) An agency shall require that an aggrieved person who believes that he has been discriminated against because of race, color, religion, sex, or national origin consult with an Equal Employment Opportunity Counselor when he wishes to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the merits of the matter; to keep a record of his counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing his actions and advice both to the agency and the aggrieved person concerning the merits of the matter.

issues in

issues in

The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct his final interview with the aggrieved person not later than 15 workdays after the date on which the

21 calendar days

If the final interview is not concluded within 21 days and the matter has not previously been resolved to the satisfaction of the aggrieved person, the aggrieved person shall be informed in writing at that time of his right to file a complaint of discrimination. The notice shall inform the complainant of his right to file a complaint at any time after receipt of the notice up to 15 calendar days after the final interview (which shall be so identified in writing by the Equal Employment Opportunity Counselor) and the appropriate official with whom to file a complaint. The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint.

matter was called to his attention by the aggrieved person. The Equal Employment Opportunity Counselor shall advise the aggrieved person in the final interview of his right to file a complaint of discrimination with the organization's Equal Employment Opportunity Officer if the matter has not been resolved to his satisfaction and of the time limits governing the acceptance of a complaint in section 713.214. The Equal Employment Opportunity Counselor shall not reveal the identity of an aggrieved person who has come to him for consultation, except when authorized to do so by the aggrieved person, until the agency has accepted a complaint of discrimination from him.

(b) The agency shall assure that full cooperation is provided by all employees to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

(b) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties under this section.

(c)

and be signed by the complainant. The complaint may be delivered in person or submitted by mail.

Sec. 713.214 **Filing and presentation of complaint.** (a) *Time limits.* (1) An agency shall require that a complaint be submitted in writing by the complainant or his representative. The agency may accept the complaint for processing in accordance with this subpart only if—

30

30

;

(i) the complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him to believe he had been discriminated against within 15 calendar days of the date of that matter, or, if a personnel action, within 15 calendar days of its effective date; and

(ii) the complainant submitted his written complaint to the Equal Employment Opportunity Officer within 15 calendar days of the date of his final interview with the Equal Employment Opportunity Counselor.

or his representative
an appropriate official

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, an Equal Employment Opportunity Officer, a Federal Women's Program Coordinator, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with subparagraph (3) of this paragraph.

Attachment 1 to FPM Ltr. 713-17 (10)

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge to the complainant or his representative in writing receipt of the complaint and advise the complainant in writing of all his administrative rights and of his right to file a civil action as set forth in section 713.281, including the time limits imposed on the exercise of these rights.

(4) The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of section 713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative, and of his right to file a civil action as described in section 713.281.

[(2)] The agency shall extend the time limits in this section (i) when the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits, or (ii) for other reasons considered sufficient by the agency.

(b) *Presentation of complaint.* At any stage in the presentation of a complaint, includin the counseling stage under section 713.213, the complainant [shall be free from restraint, interference, coercion, discrimination, or reprisal and] shall have the right to be accompanied, represented, and advised by a representative of his own choosing. If the complainant is an employee of the agency, he shall have a reasonable amount of official time to present his complaint if he is otherwise in an active duty status. If the complainant is an employee of the agency and he designates another employee of the agency as his representative, the representative shall [be free from restraint, interference, coercion, discrimination, or reprisal, and shall] have a reasonable amount of official time, if he is otherwise in an active duty status, to present the complaint.

Sec. 713.215 **Rejection or cancellation of complaint.** When the head of the agency, or his designee, decides to reject a complaint because it was not timely filed or because it is not within the purview of section 713.212 or to cancel a complaint because of a failure of the complainant to prosecute the complaint or because of a separation of the complainant which is not related to his complaint, he shall transmit the decision by letter to the complainant and his representative.] →The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted.[←]

Attachment 1 to FPM Ltr. 713-17 (11)

Sec. 713.216 **Investigation.** (a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall occupy a position in the agency which is not, directly or indirectly, under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term "investigative file" shall mean the various documents and information acquired during the investigation under this section—including affidavits of the complainant, of the alleged discriminating official, and of the witnesses and copies of, or extracts from, records, policy statements, or regulations of the agency—organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membership or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarily; he shall not require or coerce an employee to provide this information. [The agency shall furnish the complainant or his representative a copy of the investigative file.]

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a written authorization (1) to investigate all aspects of complaints of discrimination, (2) to require all employees of the agency to cooperate with him in the conduct of the investigation, and (3) to require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

Sec. 713.217 **Adjustment of complaint and offer of hearing.** (a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis after the complainant has reviewed the investigative file. If an adjustment of the complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant.

For this purpose, the agency shall furnish the complainant or his representative a copy of the investigative file promptly after receiving it from the investigator, and provide opportunity for the complainant to discuss the investigative file with appropriate officials.

If the agency does not carry out, or rescinds, any action specified by the terms of the adjustment for any reason not attributable to acts or conduct of the complainant, the agency shall, upon the complainant's written request, reinstate the complaint for further processing from the point processing ceased under the terms of the adjustment.

(b) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing [of the proposed disposition thereof. In that notice, the agency shall advise the complainant of →his right to a hearing with a subsequent decision by the head of the agency or his designee and his right to such a decision← without a hearing. The agency shall allow the complainant seven calendar days from receipt of the notice to notify the agency whether or not he wishes to have a hearing.]

(1) of the proposed disposition of the complaint, (2) of his right to a hearing and decision by the agency head or his designee if he notifies the agency in writing within 15 calendar days of the receipt of the notice that he desires a hearing, and (3) of his right to a decision by the head of the agency or his designee without a hearing.

15-day

(c) If the complainant fails to notify the agency of his wishes within the [7-day] period prescribed in paragraph (b) of this section, the appropriate Equal Employment Opportunity Officer may adopt the disposition of the complaint proposed in the notice sent to the complainant under paragraph (b) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal

Employment Opportunity Officer shall transmit the decision by letter to the complainant and his representative which shall inform the complainant of his right of appeal to the Commission and the time limit applicable thereto. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency, or his designee, for decision under section 713.221.

and of his right to file a civil action as described in section 713.281.

Sec. 713.218 **Hearing.** (a) *[Appeals] examiner.* The hearing shall be held by an [appeals] examiner who must be an employee of another agency except when the agency in which the complaint arose is (1) the government of the District of Columbia or (2) an agency which, by reason of law, is prevented from divulging information concerning the matter complained of to a person who has not received the security clearance required by that agency, in which event the agency shall arrange with the Commission for the selection of an impartial employee of the agency to serve as [appeals] examiner. (For purposes of this paragraph, the Department of Defense is considered to be a single agency.) The agency in which the complaint arose shall request the Commission to supply the name of an [appeals] examiner who has been certified by the Commission as qualified to conduct a hearing under this section.

Complaints
a complaints
complaints
a complaints

(b) *Arrangements for hearing.* The agency in which the complaint arose shall transmit the complaint file containing all the documents described in section 713.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the [appeals] examiner in making his recommended decision on the complaint), to the [appeals] examiner who shall review the complaint file to determine whether further investigation is needed before scheduling the hearing. When the [appeals] examiner determines that further investigation is needed, he shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of witnesses necessary to supply the needed information at the hearing. The requirements of section 713.216 apply to any further investigation by the agency on the complaint. The [appeals] examiner shall schedule the hearing for a convenient time and place.

complaints
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complaints

complaints

(c) *Conduct of hearing.* (1) Attendance at the hearing is limited to persons determined by the [appeals] examiner to have a direct connection with the complaint.

(2) The [appeals] examiner shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the [appeals] examiner shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence. The complainant, his representative, and the representatives of the agency at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

complaints

complaints

complaints

(d) *Powers of [appeals] examiner.* In addition to the other powers vested in the [appeals] examiner by the agency in accordance with this subpart, the agency shall authorize the [appeals] examiner to:

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof;

(4) Limit the number of witnesses whose testimony would be unduly repetitious; and

(5) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

complaints

any agency subject to this subpart

(e) *Witnesses at hearing.* The [appeals] examiner shall request [the agency] to make available as a witness at the hearing an employee requested by the complainant when he determines that the testimony of the employee is necessary. He shall also request the appearance of [any other employee] whose testimony he [desires to supplement the information in the investigative file. The appeals] examiner shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. [The agency] shall make its employees available as witnesses at a hearing on a complaint when requested to do so by the [appeals] examiner and it is [administratively practicable] to comply with the request. When it is [not administratively practicable] to comply with the request for a witness, the agency shall provide an explanation to the

may

an employee of any Federal agency

determines is necessary to furnish

information pertinent to the complaint under consideration. The complaints

An agency to whom a request is made

complaints

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[appeals] examiner. If the explanation is inadequate, the [appeals] examiner shall so advise the agency and request it to make the employee available as a witness at the hearing. If the explanation is adequate, the [appeals] examiner shall insert it in the record of the hearing, provide a copy to the complainant, and make arrangements to secure testimony from the employee through a written interrogatory. [Employees of the] agency shall be in a duty status during the time [they are] made available as [witnesses. Witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony at the hearing or during the investigation under section 713.216.]

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a witness,

(f) *Record of hearing.* The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the [appeals] examiner at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

complaints

(g) *Findings, analysis, and recommendations.* The [appeals] examiner shall transmit to the head of the agency or his designee (1) the complaint file (including the record of the hearing),

complaints

(2) the findings and analysis of the [appeals] examiner with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and (3) the recommended decision of the [appeals] examiner on the merits of the complaint, including recommended remedial action, where appropriate, with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose. The [appeals] examiner shall notify the complainant of the date on which this was done. In addition, the [appeals] examiner shall transmit, by separate letter to the Director of Equal Employment Opportunity, whatever findings and recommendations he considers appropriate with respect to conditions in the agency [having no bearing on the matter which gave rise to the complaint or the general environment out of which the complaint arose.

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Sec. 713.219 **Relationship to other agency appellate procedures.** →(a) Except as provided in paragraphs (b) and (c) of this section, when an employee← makes a written allegation of discrimination on grounds of race, color, religion, sex, or national origin, in connection with an action that would otherwise be processed under →a grievance or appeals system← of the agency, the agency may process the allegation of discrimination under →that system when the system← meets the principles and requirements in sections 713.212 through 713.220 and the head of the agency, or his designee, makes the decision of the agency on the issue of discrimination. That decision on the issue of discrimination shall be incorporated in and become a part of the decision on the grievance or appeal.

→(b) An allegation of discrimination made in connection with an appeal under subpart B of part 771 of this chapter shall be processed under that subpart.

(c) An allegation of discrimination made in connection with a grievance under subpart C of part 771 of this chapter shall be processed under this part.←

Sec. 713.220 **Avoidance of delay.** (a) The complaint shall be resolved promptly. To this end, both the complainant and the agency shall proceed with the complaint without undue delay so that the complaint is resolved [except in unusual circumstances, within 60 calendar days after its receipt by the Equal Employment Opportunity Officer, exclusive of time spent in the processing of the complaint by the [appeals] examiner under section 713.218. ★★[When the complaint has not been resolved within this limit, the complainant may appeal to the Commission for a review of the reasons for the delay. Upon review of this appeal, the Commission may require the agency to take special measures to ensure prompt processing of the complaint or may accept the appeal for consideration under section 713.234.]

within 180 calendar days after it was filed, including

complaints

(b) The head of the agency or his designee may cancel a complaint if the complainant fails to prosecute the complaint without undue delay. However, instead of cancelling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

(c) The agency shall furnish the Commission monthly reports on all complaints pending within the agency in a form specified by the Commission. If an agency has not issued a final decision, and has not requested the Commission to supply a complaints examiner, within 75 calendar days from the date a complaint was filed, the Commission may require the agency to take special measures to ensure prompt processing of the complaint or may assume responsibility for processing the complaint, including supplying an investigator to conduct any necessary investigation on behalf of the agency. When the Commission supplies an investigator, the agency shall reimburse the Commission for all expenses incurred in connection with the investigation and shall notify the complainant in writing of the proposed disposition of the complaint no later than 15 calendar days after its receipt of the investigative report.

(d) When the complaints examiner has submitted a recommended decision finding discrimination and the agency has not issued a final decision within 180 calendar days after the date the complaint was filed, the complaints examiner's recommended decision shall become a final decision binding on the agency 30 calendar days after its submission to the agency. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the complaints examiner under section 713.218(g) and a copy of the hearing record and also shall notify him in writing of his right of appeal to the Commission and the time limits applicable thereto and of his right to file a civil action as described in section 713.281.

Sec. 713.221 **Decision by head of agency or designee.** (a) The head of the agency, or his designee, shall make the decision of the agency on a complaint based on information in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

→(b)(1) The decision of the agency shall be in writing and shall be transmitted by letter to the complainant and his representative.

When there has been no hearing, the decision shall contain the specific reasons in detail for the agency's action, including any remedial action taken.

(2) When there has been a hearing on the complaint, the decision letter shall transmit a copy of the findings, analysis, and recommended decision of the [appeals] examiner under section 713.218(g) and a copy of the hearing record. The decision of the agency shall adopt, reject, or modify the decision recommended by the [appeals] examiner. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the [reasons] for rejection or modification.

(3) When there has been no hearing and no decision under section 713.217(c), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c) The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity[,]

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specific reasons in detail

, whether or not there is a finding of discrimination. When discrimination is found, the agency shall require remedial action to be taken in accordance with section 713.271, shall review the matter giving rise to the complaint to determine whether disciplinary action against alleged discriminatory officials is appropriate, and shall record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be included in the compla nt file.

(d) The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission [and of the time limit within which the appeal may be submitted.]

, of his right to file a civil action in accordance with section 713.281, and of the time limits applicable thereto.

Sec. 713.222 **Complaint file.** The agency shall establish a complaint file [containing] all documents pertinent to the complaint. The

. Except as provided in section 713.221(c), this file shall contain

complaint file shall include copies of [(a)] the written report of the Equal Employment Opportunity Counselor under section 713.213 to the Equal Employment Opportunity Officer on whatever precomplaint counseling efforts were made with regard to the complainant's case, [(b)] the complaint, [(c)] the investigative file, [(d)] if the complaint is withdrawn by the complainant, a written statement of the complainant or his representative to that effect, [(e)] if adjustment of the complaint is arrived at under section 713.217, the written record of the terms of the adjustment, [(f)] if no adjustment of the complaint is arrived at under section 713.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of his right to a hearing, [(g)] if decision is made under section 713.217(c), a copy of the letter to the complainant transmitting that decision, [(h)] if a hearing was held, the record of the hearing, together with the [appeals] examiner's findings, analysis, and recommended decision on the merits of the complaint, [(i)] if the Director of Equal Employment Opportunity is not the

(a) the notice of the Equal Employment Opportunity Counselor to the aggrieved person under section 713.213(a), (b)

(c)

(d)

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designee, the recommendations, if any, made by him to the head of the agency or his designee, and (j) if decision is made under section 713.221, a copy of the letter transmitting the decision of the head of the agency or his designee. The complaint file shall not contain any document that has not been made available to the complainant or to his designated physician under section 294.401 of this chapter.

(k)

, or a portion thereof, for reasons covered by section 713.215;

Appeal to the Commission

Sec. 713.231 Entitlement. (a) Except as provided by paragraph (b) of this section, a complainant may appeal to the Commission the decision of the head of the agency, or his designee:

(1) To reject his complaint because (i) it was not timely filed, or (ii) it was not within the purview of the agency's regulations; or

(2) To cancel his complaint (i) because of the complainant's failure to prosecute his complaint or (ii) because of the complainant's separation which is not related to his complaint; or

(3) On the merits of the complaint, under section 713.217(c) or 713.221, but the decision does not resolve the complaint to the complainant's satisfaction.

(b) A complainant may not appeal to the Commission under paragraph (a) of this section when the issue of discrimination giving rise to the complaint is being considered, or has been considered, in connection with any other appeal by the complainant to the Commission.

Sec. 713.232 Where to appeal. The complainant shall file his appeal in writing, either personally or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415.

Sec. 713.233 Time limit. (a) Except as provided in paragraph (b) of this section, a complainant may file an appeal at any time after receipt of his agency's notice of final decision on his complaint but not later than 15 calendar days after receipt of that notice.

(b) The time limit in paragraph (a) of this section may be extended in the discretion of the Board of Appeals and Review, upon a showing by the complainant that he was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit.

Sec. 713.234 Appellate procedures. The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board. The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof to the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, and there is no further right to appeal.

but shall contain a notice of the right to file a civil action in accordance with Section 713.282

Sec. 713.235 Review by the Commissioners. The Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued;

(2) The previous decision involves an erroneous interpretation of law or regulation or a misapplication of established policy; or

(3) The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand, or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

Sec. 713.236 Relationship to other appeals. When the basis of the complaint of discrimination because of race, color, religion, sex, or national origin involves an action which is otherwise appealable to the Commission, the case, including the issue of discrimination, will be processed under the regulations appropriate to that appeal when the complainant makes a timely appeal to the Commission in accordance with those regulations.

and the complainant having been informed by the agency of his right to proceed under this subpart elects to proceed by appeal to the Commission,

Reports to the Commission

Sec. 713.241 Reports to the Commission. Each agency shall report to the Commission information concerning precomplaint counseling

on complaints

tatus and disposition of complaints subpart at such times and in such the Commission prescribes.

Third Party Allegations

Sec. 713.251 Third-party allegations of discrimination. (a) Coverage. This section applies to general allegations by organizations or other third parties of discrimination in personnel matters within the agency which are unrelated to an individual complaint of discrimination subject to section 713.211 through 713.222.

(b) Agency procedure. The organization or other third party shall state the allegation with sufficient specificity so that the agency may investigate the allegation. The agency may require additional specificity as necessary to proceed with its investigation. The agency shall establish a file on each general allegation, and this file shall contain copies of all material used in making the decision on the allegation. The agency shall furnish a copy of this file to the party submitting the allegation and shall make it available to the Commission for review on request. The agency shall notify the party submitting the allegation of its decision, including any corrective action taken on the general allegations, and shall furnish to the Commission on request a copy of its decision.

(c). Commission procedures. If the third party disagrees with the agency decision, it may, within 30 days after receipt of the decision, request the Commission to review it. The request shall be in writing and shall set forth with particularity the basis for the request. When the Commission receives such a request, it shall make, or require the agency to make, any additional investigations the Commission deems necessary. The Commission shall issue a decision on the allegation ordering such corrective action, with or without back pay, as it deems appropriate.

Freedom from Reprisal or Interferences

Section 713.261. Freedom from reprisal. (a) Complainants, their representatives, and witnesses shall be free from restraint, interference, coercion, discrimination or reprisal at any stage in the presentation and processing of a complaint, including the counseling stage under section 713, or any time thereafter.

Sec. 713.262 Review of allegations of reprisal. (a) Choice of review procedures. A complainant, his representative, or a witness who alleges restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint under this subpart, may, if an employee or applicant, have the allegation reviewed as an individual complaint of discrimination subject to section 713.211 through 713.222 or as a charge subject to paragraph (b) of this section.

(b) Procedure for review of charges. (1) An employee or applicant may file a charge of restraint, interference, coercion, discrimination, or reprisal in connection with the presentation of a complaint with an appropriate agency official as defined in section 713.214 (a) (2) within 15 calendar days of the date of the alleged occurrence. The charge shall be in writing and shall contain all pertinent facts. Except as provided in subparagraph (2) of this paragraph, the agency shall undertake an appropriate inquiry into such a charge and shall forward to the Commission within 15 calendar days of the date of its receipt a copy of the charge

and report of action taken. The agency shall also provide the charging party with a copy of the report of action taken. When the agency has not completed an appropriate inquiry 15 calendar days after receipt of such a charge, the charging party may submit a written statement with all pertinent facts to the Commission, and the Commission shall require the agency to take whatever action is appropriate.

(c) When a complainant, after completion of the investigation of his complaint under section 713.216, requests a hearing and in connection with that complaint alleges restraint, interference, coercion, discrimination, or reprisal, the complaints examiner assigned to hold the hearing shall consider the allegations as an issue in the complaint at hand or refer the matter to the agency for further processing under the procedure chosen by the complainant pursuant to paragraph (a) of this section.

Remedial Actions

Sec. 713.271 Remedial actions. (a) Remedial action involving an applicant. (1) When an agency, or the Commission, finds that an applicant for employment has been discriminated against and except for that discrimination would have been hired, the agency shall offer the applicant employment of the type and grade denied him. The offer shall be made in writing. The individual shall have 15 calendar days from receipt of the offer within which to accept or decline the offer. Failure to notify the agency of his decision within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his control prevented him from responding within the

time limit. If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired, subject to the limitation in subparagraph (4) of this paragraph. Back pay, computed in the same manner prescribed by section 550.804 of this chapter, shall be awarded from the beginning of the retroactive period, subject to the same limitation, until the date the individual actually enters on duty. The individual shall be deemed to have performed service for the agency during this period of retroactivity for all purposes except for meeting service requirements for completion of a probationary or trial period that is required. If the offer is declined, the agency shall award the individual a sum equal to the back pay he would have received, computed in the same manner prescribed by section 550.804 of this chapter, from the date he would have been appointed until the date the offer was made, subject to the limitation of subparagraph (4) of this paragraph. The agency shall inform the applicant, in its offer, of his right to this award in the event he declines the offer.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but does not find that the individual is the one who would have been hired except for discrimination, the agency shall consider the individual for any existing vacancy of the type and grade for which he had been considered initially and for which he is qualified before consideration is given to other candidates. If the individual is not selected, the agency shall record the reasons for non-selection. If no vacancy exists, the agency shall give him this priority consideration for the next vacancy for which he is qualified. This priority shall take precedence over

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priorities provided under other regulations in this chapter.

(3) This paragraph shall be cited as the authority under which the above-described appointments or awards of back pay shall be made.

(4) A period of retroactivity or a period for which back pay is awarded under this paragraph may not extend from a date earlier than two years prior to the date on which the complaint was intitially filed by the applicant. If a finding of discrimination was not based on a complaint, the period of retroactivity or period for which back pay is awarded under this paragraph may not extend earlier than two years prior to the date the finding of discrimination was recorded.

(b) Remedial action involving an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

(1) Retroactive promotion, with back pay computed in the same manner prescribed by section 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been promoted or would have been employed at a higher grade, except that the back pay liability may not accrue from a date earlier than two years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the back pay liability may not accrue from a date earlier than two years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted.

(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any reference to or any record of an unwarranted disciplinary action that is not a personnel action.

(5) Full opportunity to participate in the employee benefit denied him (e.g., training, preferential work assignments, overtime scheduling).

Right to File a Civil Action

Sec. 713.281 Statutory right. An employee or applicant is authorized by section 717 (c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States District Court within:

(a) Thirty (30) calendar days of his receipt of notice of final action taken by his agency on a complaint,

(b) One hundred-eighty (180) calendar days from the date of filing a complaint with his agency if there has been no decision,

(c) Thirty (30) calendar days of his receipt of notice of final action taken by the Commission on his complaint, or,

(d) One hundred-eighty (180) calendar days from the date of filing an appeal with the Commission if there has been no Commission decision.

Sec. 713.282 Notice of right. An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under section 713.215, 713.217, or 713.221. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under section 713.234.

Sec. 713.283 Effect on administrative processing. The filing of a civil action by an employee or applicant does not terminate agency processing of a complaint or Commission processing of an appeal under this subpart.

Subject: NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

From: EEO Counselor (Specific Installation) DATE:

To: Name of Person Counseled

This is to inform you that although counseling on the matter you brought to the attention of the EEO Counselor has not been completed, 21 calendar days have gone by since you first contacted the Counselor and you are now entitled, if you want to do so, to file a discrimination complaint if you believe you have been discriminated against on the basis of race, color, religion, sex or national origin.

If you do not file a complaint at this time, counseling will continue and your right to file a complaint will also continue until 15 calendar days AFTER THE FINAL INTERVIEW with the Counselor. The Counselor will inform you in writing when the final counseling interview is conducted.

If you file a complaint, it must be in writing and be filed in person or by mail with the Director of Equal Employment Opportunity (provide specific mailing address), or any of the following officials authorized to receive discrimination complaints:

- o Agency Head
  (Provide address)
- o Installation Head
  (Provide address)
- o EEO Officer
  (Provide address)
- o Federal Women's Program Coordinator
  (Provide address)

Note to Agency:

A copy of this notice should be kept by the Counselor. If a complaint is filed, the copy should accompany the Counselor's report on is counseling activities and made a part of the complaint file. This notice should be given by the Counselor to the person counseled 21 calendar days after the Counselor was first consulted on the matter by the employee or applicant.

Attachment 3 to FPM Ltr. 713-17

Subject: NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR

From: EEO Counselor (Specific Installation) DATE:

To: Name of Person Counseled

This is notice of the final counseling interview in connection with the matter you presented to the EEO Counselor.

If you believe you have been discriminated against on the basis of race, color, religion, sex or national origin, you have the right to file a COMPLAINT OF DISCRIMINATION WITHIN 15 CALENDAR DAYS AFTER RECEIPT OF THIS NOTICE.

The complaint must be in writing and may be filed in person or by mail with the Director of Equal Employment Opportunity (provide specific mailing address), or any of the following officials authorized to receive discrimination complaints:

- o Agency Head
  (Provide address)
- o Installation Head
  (Provide address)
- o EEO Officer
  (Provide address)
- o Federal Women's Program Coordinator
  (Provide address)

Note to Agency:

A copy of this notice should be kept by the Counselor. If a complaint is filed, the copy should accompany the Counselor's report on his counseling activities and made a part of the complaint file.

Attachment 4 to FPM Ltr. 713-17

Subject: NOTICE OF RECEIPT OF DISCRIMINATION COMPLAINT

From: Director of EEO (or other appropriate official) DATE:

To: Complainant

The purpose of this notice is to acknowledge receipt of your discrimination complaint and to provide you with written notification of your rights as well as the time requirements for exercising those rights. If you have further questions ask your EEO Counselor or Equal Employment Opportunity Officer.

- o Your complaint will be investigated. Based on the information developed by the investigation an effort at an adjustment on an informal basis will be made. You will receive a copy of the investigative report and have an opportunity to discuss it with an appropriate agency official.
- o If an adjustment of the complaint is arrived at, the terms of the adjustment will be reduced to writing and you will be provided a copy.
- o If an adjustment of the complaint is not arrived at, you will be notified in writing of the proposed disposition of the complaint. You will also be notified of your right to a hearing by an EEO Complaints Examiner who will recommend a decision to your agency, or to a decision by the agency head or his designee without a hearing. If you want a hearing, or a decision by the agency head or his designee without a hearing, you must NOTIFY THE AGENCY IN WRITING WITHIN 15 CALENDAR DAYS OF RECEIPT OF THE PROPOSED DISPOSITION OF YOUR COMPLAINT.
- o If you fail to request a hearing or to ask for a decision by the agency head without a hearing within the 15 days of your receipt of the proposed disposition, that disposition will become the final decision of the agency. YOU MAY APPEAL THE FINAL AGENCY DECISION ON YOUR COMPLAINT TO THE COMMISSION WITHIN 15 CALENDAR DAYS OR YOU MAY FILE A CIVIL ACTION IN AN APPROPRIATE U. S. DISTRICT COURT WITHIN 30 DAYS.

Attachment 4 to FPM Ltr. 713-17 (2)

- o If you are dissatisfied with the final decision of the agency (after a hearing or without a hearing), you may appeal to the Civil Service Commission within 15 calendar days of receipt of the notice or within 30 days you may file a civil action in an appropriate U.S. District Court.

- o If you decide to appeal to the Commission's Board of Appeals and Review you will still have an opportunity to file a civil action in U.S. District Court within 30 days after receipt of the Board's decision, or within 180 days of your appeal to the Board if no final decision has been rendered.

- o If the agency has not issued a final decision on your complaint within 180 days of the date it was filed, you may file a civil action in an appropriate U.S. District Court.

Note to Agency:

A copy of the notice as given to the complainant should be filed by the agency in the complaint file.

Attachment 5 to FPM Ltr. 713-17

Subject: NOTICE OF PROPOSED DISPOSITION OF DISCRIMINATION COMPLAINT

From: EEO Officer DATE:

To: Complainant

The purpose of this notice is to inform you of the proposed disposition of your discrimination complaint and your rights if you are dissatisfied with the proposed disposition.

- o PROPOSED DISPOSITION

  (State the specific proposed disposition of the complaint)

- o RIGHT OF HEARING

  If you are dissatisfied with the proposed disposition, you may request a hearing and decision by the agency head or his designee, if YOU NOTIFY THE AGENCY WITHIN 15 CALENDAR DAYS OF RECEIPT OF THE NOTICE that you desire a hearing.

- o RIGHT OF DECISION WITHOUT A HEARING

  If you are dissatisfied with the proposed disposition, you may request a decision by the head of the agency or his designee without a hearing.

If you fail to notify the agency of your wishes within the 15 day period, the EEO Officer may adopt as the agency's final decision the proposed disposition shown above and will so notify you in writing. Upon receipt of notification you may appeal to the Civil Service Commission within 15 calendar days or file a civil action in a Federal District Court within 30 days.

If you appeal to the Commission, you may still file a civil action within 30 days of receipt of the Commission decision or within 180 days of your appeal to the Commission if you have not received a final decision from the Commission.

Note to Agency:

A copy of the notice as given to the complainant should be filed by the agency in the complaint file.

Attachment 6 to FPM Ltr. 713-17

Subject: NOTICE OF FINAL DECISION OF AGENCY

From: Agency Head or Designee DATE:

To: Complainant

Attached to this notice is the final decision of the agency on your complaint of discrimination. If you are dissatisfied with this final decision, you have the following appeal rights:

- o You may appeal to the Civil Service Commission within 15 calendar days of receipt of the decision.
- o You may file a civil action in an appropriate U. S. District Court within 30 days of receipt of the decision.
- o If you elect to appeal to the Commission, a civil action in a U. S. District Court may be filed within 30 days of receipt of the Commission's final decision.
- o A civil action may also be filed anytime after 180 days of the date of initial appeal to the Commission, if there has not been a final decision rendered.

Note To Agency:

This form is to be used under the following circumstances:

(1) when a discrimination complaint is rejected or cancelled;

(2) when a proposed disposition is adopted after failure to request a hearing or decision by the agency without a hearing;

(3) when a final agency decision is made after a recommended decision by the Complaints Examiner; and,

(4) when an agency makes a final decision on the merits without a hearing.

A copy of the notice as given to the complainant should be filed by the agency in the complaint file.

GPO 862-130

APPENDIX C

Documents Related to EEO Procedures

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

YOUR REFERENCE

OCT 24 1974

Ms. Phyllis McClure
NAACP Legal Defense Fund
Room 510
1028 Connecticut Avenue N.W.
Washington, D. C. 20036

Dear Ms. McClure:

This responds to your telephone request of October 23, 1974. Enclosed are materials which provide guidance for the investigation of EEO discrimination complaints and describe the complaint process. This list, though not comprehensive, consists of instructions, regulations and guidelines which we rely on most in providing assistance to complainants and agencies in the processing of EEO complaints.

* 1) FPM Letter No. 713-17
2) FPM Letter No. 713-21
3) FPM Letter No. 713-28
4) FPM Letter No. 713-20
5) Chairman letter June 18, 1973
6) Bulletin No. 713-34
7) Bulletin No. 713-35
8) Personnel Methods Series No. 18
* 9) Appendix B-6, FPM Chapter 713 (under revision)
**10) Personnel Methods Series No. 17

* Guidance on the investigation of discrimination complaints.
** Revised October 1974 (pending publication)

I hope this information answers some of your questions. If we can be of further assistance let us know.

Sincerely yours,

Walter J. Dent

Walter J. Dent, Acting Chief
Discrimination Complaints and
Enforcement Section

1883-1973

MERIT PRINCIPLES ASSURE QUALITY AND EQUAL OPPORTUNITY

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS REVIEW BOARD
Washington, D. C. 20415

D E C I S I O N

IN THE MATTER OF

MILTON JONES, JR.

TYPE CASE: Discrimination Based On Race

Before: Roel, Bechtold and McDonald, Board Members

INTRODUCTION

The complainant appealed from the March 19, 1974, decision by the Director of Equal Employment Opportunity, Department of the Army, which found that the complainant had not been discriminated against because of his race in connection with his non-selection for promotion to a GS-12 Architect position. The agency decision further found that the complainant had been discriminated against because of his race in his employment situation at the Mobile District, Corps of Engineers.

STATEMENT OF THE CASE

The complainant, a Black male, is employed by the Mobile District, Corps of Engineers, in the position of Architect, GS-11.

On July 12, 1972, the complainant contacted an Equal Employment Opportunity Counselor and indicated his desire to file a discrimination complaint concerning the selection of another employee for a vacant GS-12 Architect's position. No informal resolution of the matter was reached and complainant filed a formal complaint of discrimination on September 21, 1972, alleging that racial discrimination had occured in the selection of another employee for the vacancy in question.

An investigation was conducted and an investigative report submitted on January 26, 1973. Based on the investigative report, a proposed disposition of the complaint was issued by the agency on November 2, 1973, denying the complaint of discrimination. The complainant then requested a hearing in connection with his complaint, which was conducted on November 30, 1973. In his report, the Complaint's Examiner recommended that a

finding be made that the allegation of discrimination based on race was not supported by the evidence.

AGENCY DECISION

The final agency decision, issued on March 19, 1974, held that the evidence of record did not substantiate complainant's allegation of racial discrimination in regard to his non-selection for promotion to the position of Architect, GS-12. However, the agency found that the Mobile District, Corps of Engineers had failed to implement the agency's affimative Equal Employment Opportunity program; that the complainant had not been provided the opportunity for maximum utilization of his education and training; and that the complainant had been subjected to a climate of racial prejudice in the work environment at the Mobile District. The agency also found that complainant's promotional opportunities had been adversely affected and that except for his race, he might have progressed under the Department's Career Program to the GS-12 level in the Mobile District or elsewhere in the Corps of Engineers. It was also the agency decision that complainant was otherwise discriminated against in his employment situation. Based on its findings, the agency directed that the complainant be given continuing priority consideration for available GS-12 vacancies in the Mobile District, Corps of Engineers, for which he is qualified, until complainant is selected for promotion or until he declines a bona fide offer.

REPRESENTATIONS TO THE APPEALS REVIEW BOARD

In his letter of appeal to the Board dated April 18, 1974, the complainant expressed dissatisfaction with the agency's decision and requested a review of his case. Specifically, the complainant questioned the thoroughness of the investigative findings of the Investigator assigned to his case, and he questioned the appraisals given the three candidates for the GS-12 position in question. Complainant also refers to a further act of alleged discrimination occurring within the last five months, not previously made a part of his complaint of discrimination.

ANALYSIS AND FINDINGS

The Board has considered the complainant's allegations in light of the entire record established in his case. As a result of its review, the Board finds that the complainant's allegation of racial discrimination in connection with his non-selection for promotion to the specific GS-12 Architect position is unsupported by the evidence of record.

Complainant's main argument throughout the complaint of discrimination has been that he was the best qualified of the three candidates for the position

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in question. In this connection he questions the appraisals given to the other candidates by their supervisor, which appraisals formed the basis for the selecting official's final choice for the position.

The Board finds no evidence, other than the complainant's unsupported allegations, that the appraisals in question were the result of racial bias on the part of the official who completed those appraisals, and that said official was not listed as an alleged discriminating party. The record reflects that each of the candidates for the position in question was rated "Highly Qualified" for the position and the choice of any one of the candidates would have been justifiable. Moreover, the record indicates that the selecting official (who is the alleged discriminating party) based his selection upon his intimate acquaintance with the work, experience and knowledges of all of the candidates, not just on the promotion appraisals.

In situations where the available candidates are substantially equally qualified for a position, the selecting official has the discretion to choose the candidate whom he believes can best perform the duties of the position. In this case, there is no evidence that the selecting official's evaluation of the candidates and his subsequent selection for the position were based in any way upon any consideration of the candidates' races.

While there is evidence of past inequality of treatment of the complainant which, as determined by the agency Director of Equal Employment Opportunity indicates that the complainant was not given equal training and opportunity for advancement, the evidence strongly indicates that any charge of discrimination in these practices would be laid against the prior Section Chief rather than the supervisor named by the complainant. In any event, the Board finds insufficient objective evidence to show that the failure to select the complainant for the vacant GS-12 position was because of his race.

The complainant noted that copies of employee appraisals completed on June 1, 1972, were not included in the investigative file, and he has requested that the Board review the appraisals and the personnel files of the three candidates for the position in question in order to make a decision on the relative qualifications of these candidates. The complainant has charged that the personnel files of the candidates will not substantiate the appraisals in question.

With regard to the exclusion of the appraisals from the investigative report, the Board notes that employee appraisals are considered to be confidential to the individual involved and that there is considerable latitude under Civil Service Commission regulations regarding the inclusion of such appraisals in the investigative report. The Board also notes that employee appraisals are highly subjective in nature and are between the employee, his supervisor, and agency management. Finally, as noted above, the selecting official indicated in his justification for

the selection he made that he used not only the employee appraisal but also his personal knowledge of the abilities and performance of the candidates, with all three of whom he had a long and close working relationship. Under the circumstances, the Board has no basis for any independent review of the relative qualifications of the three candidates for the GS-12 position.

Complainant, in his appeal to the Board, has also provided information not previously a part of his complaint of discrimination, not considered by the agency in the processing of his current complaint, and not covered in the agency's final decision. Accordingly, this information is not a matter for review by the Board in its adjudication of this appeal.

The Board notes that while the agency found no evidence of racial discrimination in complainant's non-selection for promotion to the GS-12 vacancy in this instance, the agency did recommend corrective action be taken in the complainant's case based on a finding that the Mobile District, Corps of Engineers, had failed to implement the agency's affirmative Equal Employment Opportunity program. The corrective action was to take the form of continuing priority consideration to the complainant for GS-12 vacancies. (Complainant was promoted to a GS-12 Architect's position on May 5, 1974 according to information furnished the Board and thus, the priority consideration recommendation would now be moot.)

DECISION

Pursuant to the foregoing, the decision issued by the Department of the Army in this case dated March 19, 1974, is hereby affirmed.

Civil Service regulations provide that the decision of the Board is final and that there is no further right of administrative appeal. However, if the complainant is not satisfied with this decision, he is entitled, under section 717(c) of the Civil Rights Act of 1964, as amended on March 24, 1972, to file a civil action in an appropriate U.S. District Court within thirty (30) calendar days of his receipt of this decision.

For the Commissioners:

William P. Berzak

William P. Berzak
Chairman

October 4, 1974

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
LYNDON B JOHNSON SPACE CENTER
HOUSTON, TEXAS 77058

REPLY TO ATTN OF: AJ

November 27, 1974

TO: JF34/Sylvester A. Barrett

FROM: AJ/Equal Opportunity Officer

SUBJECT: Notice of Proposed Disposition of Discrimination Complaint

The purpose of this notice is to inform you of the proposed disposition of your discrimination complaint and your rights if you are dissatisfied with the proposed disposition.

- Proposed Disposition

This office has been unable to informally settle your complaint. It would appear that the evidence as presented at this time does not fully support your allegation of discrimination. With regard to the back pay issue, no award can be made without a finding of discrimination by the Assistant Administrator for Equal Opportunity Programs. We, therefore, offer the following disposition which was stated in the proposed adjustment letter dated November 12, 1974: "When a GS-7 position becomes vacant within the Redistribution and Utilization Section or similar area in which you have adequate experience, you will be regarded as a strong candidate. In the event that you apply, this office and your organization director will review your qualifications and the total selection process to the extent necessary to determine that you are given all proper consideration for that position."

We feel that you should be advised of your right to a hearing or your right to a decision without a hearing.

No further action will be taken on your complaint by this office.

- Right of Hearing

If you are dissatisfied with the proposed disposition, you may request a hearing and decision by the Agency head or his designee, if *you notify the Agency within 15 calendar days of receipt of the notice* that you desire a hearing.

If you request a hearing you are expected to proceed without delay in presenting your complaint before the assigned Complaints Examiner. If you plan to have a representative, you should immediately obtain representation and you should also begin preparing a list of proposed witnesses with a summary of the testimony you believe each would present at the hearing. The Complaints Examiner will request this list immediately after being assigned to your case.

Failure to prosecute your complaint without undue delay may be grounds for the Complaints Examiner to return your case to the Agency. The Agency may thereafter issue a final decision based on the evidence present in the complaint file.

Right or Decision Without A Hearing

If you are dissatisfied with the proposed disposition, you may request a decision by the head of the Agency or his designee without a hearing, based upon the evidence present in the complaint file.

If you fail to notify the Agency of your wishes within the 15 day period, the EEO Officer may adopt as the Agency's final decision the proposed disposition shown above and will so notify you in writing. Upon receipt of notification you may appeal to the Civil Service Commission's Appeals Review Board within 15 calendar days.

We recognize that you have exercised your right to file a civil action in Federal District Court. Nevertheless, we are continuing to process your case administratively within the Agency.

Joseph D. Atkinson, Jr.

cc:
BH6/Aneta A. Davis
Gabrielle K. McDonald
1834 Southmore Blvd., Suite 203
Houston, Texas 77004

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
LYNDON B. JOHNSON SPACE CENTER
HOUSTON, TEXAS 77058

REPLY TO ATTN OF: AJ

November 27, 1974

TO: JF37/Gloria A. Williams

FROM: AJ/Equal Opportunity Officer

SUBJECT: Notice of Proposed Disposition of Discrimination Complaint

The purpose of this notice is to inform you of the proposed disposition of your discrimination complaint and your rights if you are dissatisfied with the proposed disposition.

- Proposed Disposition

In an attempt to informally resolve your situation, numerous meetings have resulted in 3 positive actions:

1. Promotion to GS-5, May 1974

2. Reassignment to the Center Property Section, Property Branch, Logistics Division (Proposed Adjustment Letter, paragraph "a", dated October 31, 1974)

3. Strong consideration for upward mobility program consistent with your interests and qualifications when the next class is announced (Proposed Adjustment Letter, paragraph "b", dated October 31, 1974). In the event of your selection for this position, you would be promoted to a GS-7 upon satisfactory completion of the one-year training required by the program.

Even though we have made positive efforts as stated above, there still remains the unresolved issue of back pay. Under the existing constraints, we are unable to consider back pay without a finding of discrimination by the Assistant Administrator for Equal Opportunity Programs. It would appear that the evidence, as presented at this time, does not fully support the allegation of discrimination; therefore, no further action will be taken on your complaint by this office. However, this does not mean that additional appeals routes are not available for further review as stated below. In view of the fact that we have exhausted all possible actions within our authority, we feel that you should be advised of your right to a hearing or your right to a decision without a hearing.

- Right of Hearing

If you are dissatisfied with the proposed disposition, you may request a hearing and decision by the Agency head or his designee, *if you notify the Agency within 15 calendar days of receipt of the notice* that you desire a hearing.

- *If you request a hearing you are expected to proceed without delay in presenting your complaint before the assigned Complaints Examiner. If you plan to have a representative, you should immediately obtain representation and you should also begin preparing a list of proposed witnesses with a summary of the testimony you believe each would present at the hearing. The Complaints Examiner will request this list immediately after being assigned to your case.*

Failure to prosecute your complaint without undue delay may be grounds for the Complaints Examiner to return your case to the Agency. The Agency may thereafter issue a final decision based on the evidence present in the complaint file.

- Right of Decision Without A Hearing

If you are dissatisfied with the proposed disposition, you may request a decision by the head of the Agency or his designee without a hearing, based upon the evidence present in the complaint file.

If you fail to notify the Agency of your wishes within the 15 day period, the EEO Officer may adopt as the Agency's final decision the proposed disposition shown above and will so notify you in writing. Upon receipt of notification you may appeal to the Civil Service Commission's Appeals Review Board within 15 calendar days.

We recognize that you have exercised your right to file a civil action in Federal District Court. Nevertheless, we are continuing to process your case administratively within the Agency.

Joseph D. Atkinson, Jr.

cc:
BH6/Aneta A. Davis
Gabrielle K. McDonald
1834 Southmore Blvd., Suite 203
Houston, Texas 77004

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY

Atlanta Field Office
1340 Spring Street, N.W.
Atlanta, Georgia 30309

IN REPLY PLEASE REFER TO
Appl:IRII:bsm

YOUR REFERENCE

March 13, 1975

Ms. Caryl Privett
Adams, Baker & Clemon
Suite 1600, 2121 Building
2121 Eighth Avenue North
Birmingham, Alabama 35203

Dear Ms. Privett:

This is in further regard to the discrimination complaint of Mrs. Dorothy Holloway.

The hearing on the complaint has been rescheduled for Monday, April 7, 1975, beginning at 9:00 a.m. in the Second Floor Conference Room, Building 4202, Marshall Space Flight Center, Huntsville, Alabama.

With regard to your request that I order the agency to answer your interrogatories and to furnish you documents, such matters are beyond the scope of my authority under Part 713 of the Civil Service Commission Regulations. If you are unable to obtain the desired information from the agency, you may request such information at the hearing and, if relevance or materiality is established, the agency will be requested to furnish these documents and they will be entered into the record as exhibits.

Sincerely yours,

Samuel F. Vesser Jr.
SAMUEL F. VESSER, JR.
Assistant Appeals Officer

cc:
Mrs. Dorothy Holloway
3805 Eaton Road
Huntsville, Alabama 35811

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

NOV 21 1975

IN REPLY REFER TO

Mr. Eric Schnapper
NAACP Legal Defense and Educational Fund
10 Columbus Circle
New York, New York 10019

Dear Mr. Schnapper:

This is in response to your telephone call of November 20, requesting data on the number of individuals who received back pay from EEOC conciliation agreements and the cumulative dollar figure of this back pay.

In FY 1975, the number of persons benefitted was 51,216; the dollar figure was $109,669,285; and the number of successful conciliations was 5,983.

In FY 1974, the number of persons benefitted was 49,388; the dollar figure was $56,266,827; and the number of successful conciliations was 4,519.

I hope that this information is useful.

Sincerely yours,

Marty Rogers

Marty Rogers
Special Assistant to the
Executive Director